PETIT
FOR WR
CERTIO

TION

RIT OF

ORARI

Supreme Court, U.S.
FILED
02 892 DEC 10 2002
OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

KIMBERLY LACEWELL BENNETT,

Petitioner,

v.

ALLFIRST BANK, formerly known as
THE FIRST NATIONAL BANK OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

KIMBERLY LACEWELL BENNETT
ATTORNEY AT LAW, *Pro Se*
12138 Central Avenue, #343
Mitchellville, MD 20721
(301) 440-8788

93PP

QUESTION PRESENTED

The question presented is whether based upon the fraudulent concealment doctrine, did the trial court and Court of Special Appeals err in striking the RICO cause of action, where Allfirst Bank deceptively dishonored thirty-two attorney escrow checks utilizing a system of final payment which knowingly violated federal law (reversal of UCC Paid Items and the aggregating of overdrafts) and not due to the lawful effects of an improperly certified check as pleaded and as discovered in the bank's internal manual and deposition testimony of participating officers of the bank on overdraft duties.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Petition	22
Conclusion	30

TABLE OF CITED AUTHORITIES

Page

Cases:

Busby v. Crown Supply, 896 F.2d 833 (4th Cir. 1990) 11

Cook County National Bank v. United States, 107 U.S. 445 (1882) 23

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 22

Martin v. Hunter's Lessee, 14 U.S. 304 (1816) 25

Neder v. U.S., 527 U.S. 1 (1999) 28

Quick v. Peoples Bank of Cullman County, 993 F.2d 793 (11th Cir. 1993) 27

Supermarket of Marlinton v. Meadow Gold Dairies, 71 F.3d 119 (4th Cir. 1995) 26

United States v. Blackmon, 839 F.2d 900 (2d Cir. 1988) 26-27

United States v. Bonnett, 877 F.2d 1450 (10th Cir. 1989) 29

United States v. Davis, 989 F.2d 244 (7th Cir. 1993) 28

United States v. Morgenstern, 933 F.2d 1108 (2d Cir. 1991) 26, 27

United States v. Ragosta, 970 F. 2d 1085 (2d Cir. 1992), *cert. denied.* 27

Cited Authorities

Page

United States v. Ratchford, 942 F.2d 702 (10th Cir. 1991), *cert denied* 29

United States v. Stavroulakis, 952 F.2d 686 (2d Cir. 1992), *cert. denied* 27

Statutes:

12 U.S.C.A. § 21, *et seq.* 1, 22, 23

18 U.S.C.A. § 656 1

18 U.S.C.A. § 1005 ..... 1, 12

18 U.S.C.A. § 1341 30

18 U.S.C.A. § 1344(1) 25, 30

18 U.S.C.A. § 1344(2) 25, 26, 30

18 U.S.C.A. § 1344(a) 23

18 U.S.C.A. § 1344(a)(1) 1

18 U.S.C.A. § 1344(a)(2) 1

28 U.S.C. § 1257 1

Cited Authorities

Page

Other Authorities:

12 CFR § 229 11

H.R. Rep. No. 901, 98th Cong., 2d Sess. 2-6 (1984) .. 26

S. Rep. No. 225, 98th Cong., 2d Sess. 377 (1983), reprinted in, 1984 U.S. Code Cong. & Admin. News 3182 26

TABLE OF APPENDICES

	Page
Appendix A — Order Of The Court Of Appeals Of Maryland Denying Petition For Rehearing Dated September 12, 2002	1a
Appendix B — Opinion Of The Court Of Special Appeals Of Maryland Dated And Filed May 29, 2002	2a
Appendix C — Reporter's Official Transcript Of Proceedings (Trial) Dated May 21, 2001	12a
Appendix D — Reporter's Official Transcript Of Proceedings (Motions Hearing) Dated May 17, 2001 And Filed August 2, 2001	20a
Appendix E — Statutes Involved	52a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The circuit court's opinion (per Martin Jr., Larnzell) striking the Second Amended Complaint (Appendix ("Pet. App.") 20a-51a). The circuit courts trial ruling (per Lombardi, James) (Appendix (" Pet. App.") 12a-19a). The Court of Special Appeals opinion (per Eyler, James R., Sonner, J., Thieme, Raymond G., Jr., (Retired, specially assigned)) (Appendix ("Pet. App.") 2a-11a), May 29, 2002, unreported. The Court of Appeals denying writ of certiorari order (per Bell, Robert M.) (Appendix ("Pet. App.") 1a), September 12, 2002, unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered its order on September 12, 2002, and denied petition for a writ of certiorari. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The provisions of the Bank Fraud Statute, 18 U.S.C.A. §§ 1344(a)(1) and (2), reprinted in the (Appendix (Pet. App.) 52a).

The provisions of The National Bank Act, 12 U.S.C.A. § 21, *et seq.*, relating to embezzlement, is now covered by §§ 656 and 1005 of Title 18, Crimes and Criminal Procedure. Provisions relevant to this petition are reprinted in the (Appendix (Pet. App.) 52a-55a).

STATEMENT OF THE CASE

On October 6, 1995, Respondents' bank officers, after removing over $100,000.00 of federally insured funds for 14 days based on a teller's failure to hole punch" through a certified check, deceptively dishonored 32 attorney escrow checks on Petitioners' "commercial account" accomplished by a known violation of federal law of reversing "UCC Paid items" and aggregating overdrafts as revealed in bank officers deposition testimony and bank manual provisions. The lawful federal effect, of the double posting of the improperly certified check which

removed funds twice for the same check, was a balance remaining in the escrow account sufficient by federal law to pay 31 of 32 dishonored checks. Respondent bank, however, was utilizing two (2) systems of final payment of checks. The "retail system" was compliant with federal law as disclosed in court compelled internal banking manuals produced by defendant approximately **one and a half months after the close of the second discovery period and 19 months after first properly requested**. Under the "commercial system", bank officers were permitted to reverse UCC Paid Items which are federally mandated nonreversible items, which was the direct cause of injury to Petitioner.

The issues of discovery thwarting by Respondent as set forth in this petition at the trial level are extensive, having been heard on 2 occassions, October 20, 2000 and January 10, 2001 by Judge Thomas P. Smith (a third discovery issue was heard on April 24, 2001 at which time Judge Smith was given notice of the federal violation discovered in manuals sought in the Oct.20 and Jan 10 hearings). On October 20, 2000, Judge Smith of the Circuit Court of Prince George's County heard Petitioner's Motion to Compel the banks internal manual and addresses and phone numbers for former bank officers who participated in the return of the checks which were first requested in June 1999, and in nine separate correspondences between September 3, 1999 and April 16, 2001.[1] The correspondances were submitted

1. December 1, 2000 letter , **one (1) month and eleven days after the Court Compelled 15 day production of addresses and phone numbers of witnesses, and one (1) year and six (6) months after first requested (and after Plaintiff had found the witnesses on her own), Defense counsel states:**

> Upon further review of the definitions set forth in your interrogatories, I agree that you requested the telephone numbers of individuals identified by Allfirst Bank. Regarding the individuals identified in the answer to Interrogatory No. 2 Allfirst Bank has the following information. . . . **Allfirst Bank does not have any telephone numbers for Krystal Fadely or Dwight Clarke because it does not possess their personnel files** . . . (emphasis added).

as Attachments to the Petition for Writ of Certiorari to the Court of Appeals (although Respondents' counsel told the Judge Larnzell Martin, ruling on the Motion to Strike Second Amended Complaint at issue in this Petition before this Court that ". . . , the bank responded to the Request for Production of Documents. We got no letter or phone call saying that these are deficient until she filed a motion a year later" (Appendix (Pet. App.) 30a). October 13, 2000 was the first offer by Respondent of less than 10 pages of a 5 volume manual and on October 20, 2001, Judge Smith compelled the entire manual which was produced by Respondent on January 24, 2002.

Petitioner diligently analyzed over **5500** pages of disorganized manual provisions produced by Respondent on January 24, 2001 and discovered that Respondents unlawful activities (reversal of UCC Paid items) were concealed, by the guise of the effects of an improperly certified check, creating an "insufficiency of funds" to pay 32 attorney escrow checks. On her own, Petitioner further found key branch officers associated with the "improperly certified check" and who participated in the return of the 32 checks and deposed them in the needed sequential order as Petitioner dealt with each one personally regarding the events at issue in this case.

Through the deposition testimony and manual provisions disclosed below, Petitioner discovered that the " corporate or commercial system" permitted security licensed branch officials to reverse items federally mandated for payment in a deliberate and consistent course of conduct. But for this federal law violation, funds remained in the escrow account to pay 31 of 32 of the dishonored checks even after the banks officers misappropriated for 14 days over $100,000.00 of Attorney trust funds based on a "hole not being punched" by defendant bank's teller. As submitted in the Petition to the Court of Special Appeals, two (2) of the thirty-one checks returned under the deceptive unlawful system of final payment were checks whereby Respondent Bank was also depository bank and dishonored their own checks, further implicating the

"scheme to defraud" clause of the bank fraud statute which requires that the defendant engage in a pattern or course of conduct designed to deceive federally chartered or insured financial institution into releasing property, with intent to victimize institution by exposing it to actual or potential loss.

BR-1297 "retail accounts" – bank's internal manual provisions:

Pertinent Uniform Commercial Code Rule

UCC Paid Items When the first debit is returned, the amount is Added (Temporarily for overdraft considerations) Back into the balance.

All subsequent items are reevaluated to see if they become payable due to the previous item(s) being returned. If the item is paid, it is a "UCCpaid item".

UCC Paid Items are must pay, nonreversible Items.

Following are relevant portions of depositions as transcribed:

February 14, 2001 – Deposition of Reginald White-Branch Manager

Q. Now, Mr. White, is it again true that based on the UCC Paid items law and based on my statement that you have in front of you, that 31 of those 32 checks would have been paid on my escrow account?

A. It appears that it would have cleared.

Q. So in your opinion, Mr. White, why did 31 of 32 checks bounce on my escrow account?

A. The items were returned because the amount that was presented against the account exceeded the amount in the account and the system made a decision to have the items returned.

February 12, 2001 – Deposition of Amelia Holland- Market Manager

Q. In addition to that $104,819.56 that was taken out of my account, when those checks were sent back as "uncollected",

there was additional money that was in my account that could have covered those checks, is that correct?

A. All of the items together, there weren't sufficient funds to pay all of the items.

February 12, 2001 – Deposition of Krystal Fadely – Teller who improperly certified check

Q. Did Reggie ever say to you that internal controls would have to fix your error in the certified checks?

A. Yes. I remember him saying there was nothing I could do personally. So maybe I made the assumption they were going to fix it themselves, I don't know, but I know that he told me there's nothing that I personally can do to fix it. Now, who was going to fix it. I don't know. I presuming it was internally.

Q. And you knew that because Reggie told you that?

A. Someone told me that, yes. I didn't say Reggie. I said someone told me that. It may have been Dwight [2], it may have been whoever. But I do remember knowing that there was nothing I could do.

After receiving Court compelled manual documents and deposing participating bank officers, Petitioner filed the second amended complaint alleging RICO on April 4, 2001, 2 months and 11 days after receiving **5500 pages of disorganized production of documents which disclosed the federal law violation, and 43 days prior to trial.** In addition to being threatened with a Motion for Sanctions by Respondents' counsel for the filing of the RICO cause of action, the following is

---

2. Affidavit of Nancy A. Miller in Response to Plaintiff's Requested For Production of Documents – produced at the October 20, 2001 hearing on Motion To Compel:

> . . . 2. Allfirst Bank has made a comprehensive and thorough search for the employment files of the five persons employed by the bank in October 1995 and requested in Plaintiff's Document Production Request. None of these persons are still working for the bank. After review of many boxes of historic records, we are unable to locate the employment files of Dwight Clarke and Crystal Fadely.

contained in a letter to Petitioner and Co-Counsel from Respondents' Counsel on April 24, 2001.

"The plaintiff held a commercial account. Section BR-1165 governs overdraft procedures for commercial accounts. See Section BR-1165 attached hereto. There is no concept of a UCC Paid item for Commercial accounts, and there is no evidence that Allfirst Bank employees deviated from Section 1165 in any manner."

In fact, Allfirst's position that the Uniform Commercial Code Paid items was not applicable to "commercial accounts" was changed to reflect compliance with the federal law requirement in September 1998, the month this litigation ensued which was revealed in the court compelled production of documents.

11.5.1-Automated Overdraft System (BRC)
September 1, 1998
Overview

This section describes the Automated Overdraft System . . . This system is used to decision both Retail and Commercial Overdrafts.

Each customer's (retail or commercial) overdraft is reviewed. . . The branch has the final authority and may reverse the recommended decision, unless it is a must pay item.

System Definitions

. . . UCC Paid Items

When the first debit is returned, the amount is added (temporarily for overdraft considerations) back into the balance. All subsequent items are reevaluated to see if they become due and payable due to the previous item(s) being returned. If the item is paid, it is a "UCC paid" item. This is an automatic process and decisions can not be reversed.

April 26, 2001 – Deposition of Barbara Puccio – Regional Operations Officer deposed over Motion for Protective Order, 24 days prior to trial

Q. Back in 1995, October 1995 for Commercial was there a screen to be assessed by computer for reviewing overdrawn commercial accounts in the branch?

A. Yes.

Q. And did that screen individually list the paid disposition for the checks presented?

A. I'm sorry. I don't understand. Are you talking about a predisposed answer as to whether the check should be paid or returned.

Q. Correct. I'm talking about —

A. Corporate accounts there are no displayed recommended decisions. They're handled differently from our-they were at that time handled differently.

Unlike the Retail Overdraft System which incorporated federal law compliance in the overdraft system, the bank's directors gave security licensed and in this case former security licensed bank officers, the ability to violate federal law as disclosed by Barbara Puccio Regional Operations Officer.

Q. When overdrawn checks come in on a commercial account, does the computer reach a decision as to whether its going to pay those checks or return those checks?

A. You're talking about corporate or retail?

Q. I'm talking about the commercial side.

A. No. A branch makes a decision to pay or return.

Q. A branch makes the decision to pay or return?

A. – or whoever is reviewing them.

Q. And what is the rationale in the branch making the decision to pay or return? Do you know? Can you answer me?

A. The branch reviews them because generally they're accounts that they would be most familiar with. And they would be the ones that you would want deciding whether or not to pay or return checks.

Q. Based on October 6 before any checks that were presented against my account came back, there was a balance in my account of $65,555.08.

A. Uh-huh

Q. When 32 checks totaling approximately $40,000 from $34,745.96 down to $25, you sitting on overdraft review for that day, how are you going to determine what checks don't get paid?

Q. Again, I would look at the relationship of the customers account. I would factor in a lot of different things, do I know this customer. I don't know how best to answer your question. It's based on a lot of different things.

Q. Is it based on how much money I have in my account at the time these checks are presented?[3]

A. It could be Obviously, there wasn't anything in your account when the checks were presented. It overdrew your account.

Q. So a person sitting on the Commercial Overdraft reviewing the facts of my bank statement before them, what will determine whether they pay any of these checks?

A. As I stated before, its based on a number of things, the dollar amount of the overdraft, how long the account has been opened, the other relationship that the bank might have with the customer —

Q. The dollar amount of the total overdrafts or the dollar amount of each overdraft?

A. It could be any of that. I can't answer to any specific – I mean, those are general things that are gone by. Each overdraft is a different case. And I can't tell you what was in the mind of any person decisioning an overdraft on any day.

A look at the record before the trial court reveals the deceptive nature of the concealment of this federal violation:

Defendant's Answers To First Set of Plaintiff's Interrogatories

Upon information and belief, the employee of First National Bank who certified the check at issue in the above-captioned action failed to punch a hole indicating that the check had been certified. As a result, the check was posted to the Plaintiff's account a second time in the normal course of business causing the account balance

3. Comments to § 4-402- Wrongful dishonor mandates payment based on account balance only.

to appear lower than it actually was. Checks received by First National Bank on the night of October 6, 1995 written on the Plaintiff's account were returned marked "uncollected"

Petitioner's Second Amended Complaint filed on April 4, 2001, paragraphs 1-56 pleads fraudulent concealment and an execution of a scheme to defraud a federally chartered and insured financial institution as follows, despite Respondents' defense counsels espousing to Judge Larnzell Martin in the Motion To strike Second Amended Complaint that "no facts were plead " (Appendix (Pet. App) 29a).

39. Defendant Bank, by and through counsel has maintained and continues to maintain that the 31 checks were returned due to the double posting of the improper certified check causing the escrow balance of $65,555.08 to be insufficient to pay any of the 31 checks presented for payment on October 6, 1995.

42. After the January 10, 2001 Motions Hearing, plaintiff received Court Compelled production of documents (**1 year and 7 months after the initial dispatching of the request to defendant**) consisting of defendants Banking Policy Manual. At this time it was discovered through defendants Banks own policy provisions of the overturning of defendant Banks Automated Overdraft System based on the specific criteria of Uniform Commercial Code law pertaining to financial transactions. Per the policy provision, the computer (assuming the **$65,555.08 statement balance** was in fact in plaintiffs account after the double posting of $104,819.56) would have returned only 1 check, paid 30 checks **and left a residual balance $20,241.01 in the escrow account** . . .

43. . . . Defendant Bank and employees of defendant bank knowingly, willfully and/or recklessly misappropriated escrow funds with the intent to deceive the plaintiff by the "smoke screen" of the improperly certified check double debiting to plaintiffs escrow account (which improper certification would have only resulted in 1 check legitimately being dishonored.

44. The misappropriation of escrowed funds was accomplished by a reversal of "UCC Paid" item and/or conversion. Defendant bank knowingly and willfully diverted, misappropriated and misapplying the escrow funds, by means of deceitful means, artful practices and false pretenses, representations and promises. Defendant Bank knowingly and willfully and/or recklessly aided and abetted employees in taking, diverting, misappropriating and misapplying the plaintiffs' property.

45. The sole rationale for the defendant's failure to handle the check in question properly, failure to correct the error, and/or other means of conversion by defendant's agents is the defendants' receipt of benefit from a pattern of racketeering activity and the use or investment of this benefit in an enterprise, the operations of which injured plaintiff and misappropriated not only $104,819,56 but $65,555.08 which would have paid 30 of 31 of the escrow checks with a residual of $20,241.01.

50. Defendant Bank under false pretenses, knowingly, willfully and/or recklessly assessed $426.98 in November, 1995 for bounced check fees and refused to return erroneously assessed bounced check fees back until March, 2000 (**4 years and 4 months**) later. Causing plaintiff to have to write a check to escrow client out of plaintiffs own personal funds for defendant Banks misappropriation of plaintiffs money and property.

Nancy Miller, General Counsel for Allfirst Bank, endorsed and caused to be mailed through the US Postal service letters to attorney trust clients letters espousing the false pretense of "the mistaken posting of a check for $104,819.56 to her account twice" created by the effect of the hole not being punched in the improperly certified check as the legitimate cause of the 32 items returned.[4] This letter sent through the US Postal service supports

4. Nancy Miller, General Counsel, Allfirst Bank letter dated November 6, 1995:

> As payee of or person interested in a check recently written on the Escrow account of Attorney Kimberly Lacewell

(Cont'd)

the second predicate act (Mail Fraud) required to support the federal RICO causes of action introduced in the second amended complaint under Section 1962. A Plaintiff under Section 1962 is allowed to proceed if it demonstrates defendant's receipt of income from a pattern of racketeering activity and the use or investment of this income in an enterprise, the operations of which injures plaintiff. *Busby v. Crown Supply*, 896 F.2d 833, 838-840 (4th Cir. 1990).

Allfirsts' General Counsels letter in addition to the espousing of a false pretense for 31 dishonors, (i.e. the effects of an improperly certified checks double posting twice to the account instead of UCC Paid Items reversal) further concealed violations of federal law (Reg CC) 12 CFR § 229 and was crucial to the banks thwarting of producing the address and phone number for Dwight Clarke as follows:

(1) "you may have experienced a problem with payment of checks presented on October 6, 1995" Per Dwight Clarke's testimony, whom Petitioner located on her own in December 2000 through diligent search, after the bank refused to provide last known address and

(Cont'd)

> Bennett at the First National Bank of Maryland, you may have experienced a problem with payment of checks presented on October 6, 1995. Checks returned unpaid by First National on the evening of October 6, 1995, were returned in error due to the mistaken posting of a check for $104,819.56 to her account twice. Specifically, the double posting occurred because of a clerical oversight in failing to punch a hole through the account number in the MICR line of the check at the time it was certified by the bank. First National sincerely regrets the error and any inconvenience it may have caused you, as well as Attorney Bennett. Please accept First National's apology for the problem. The processing of these checks should not in any way reflect poorly on Attorney Bennett, as she has always maintained sufficient balances to honor the checks written
>
> . . .

telephone number due to "loss of his personnel file", when deposed revealed that checks were actually being returned over a 2 to 3 day period.

January 9, 2001 – Deposition of Dwight Clarke – Financial Services Representative

Q. Mr. Clarke, you did not call me after the nonpayment?

A. Afterwards, on the second day of more checks coming in to be returned, it was at least two days that we were getting checks that were going to be returned. So it was prior on the first day to returning it. . ."

Q. So you're saying it was more than one day?

A. Right, it was more than one day.

Q. Checks coming in on consecutive days?

A. I'd say two days, possibly three days.

Q. Sir, you were calling me everyday checks were coming in?

A. Right. At least – that's why I say at least once the next day. It wasn't like it was a one time thing. I was trying to get a hold of you.

In fact, a list of the 32 checks reveal three presentment dates by payee banks, October 3, October 5 and October 6 as disclosed in Dwight Clark's deposition testimony. Without the aggregating of overdrafts checks could only have been legitimately returned on the night that the largest check of $69,064.94 was presented for payment because that is the only check larger than the $65,555.08 balance. The **combined total** of the 31 other checks returned was $44,609.57.

Mr. White ,being deposed after Dwight Clarke was found by Petitioner and deposed, was asked the following series of questions concerning Petitioners October **bank statement** concerning the day of presentment of the checks. **Petitioners Bank Statement reflected one date October 6 as presentment thus implicating 18 U.S.C.A § 1005 Bank entries, reports and transactions for false entries in "any book, report, or statement of such bank"**:

Q. Mr. White, can you comment as to Mr. White's testimony that checks were coming in —

A. I can't comment.

. . . To. My recall, they were done on one day and not multiple days.

Q. So Mr. Clarke's sworn deposition testimony is inaccurate?

A. I can't speak to that. If that what he recalls, I have no idea what he's referring to. I can refer to what I see here in front of me, **that items were presented on one day and returned on the same day.** (emphasis added)

Mr. White's testimony as to items presented on one day and returned on the same day is alluding to the federal requirement of same day settlement for local items. **An analysis of every attorney escrow check written from the inception of the escrow account reveals some egregious final clearing practices. For purposes of the events at issue in this litigation, same day settlement was given to each and every Montgomery County government check written from Petitioners escrow account without exception. However, Prince George's County government used the exact same depository bank and as evidenced by the non-payment of checks as small as twenty-five dollars ($25.00) and sixty-nine dollars ($69.00) with an escrow balance of $65,555.08, were subjected to unlawful redlining in their clearance. Checks for the government of the District of Columbia were cleared in the same fashion as Prince George's County government checks with the exception that none were ever returned as unpaid.**

October 6 account balance					$65,555.08
Check #	Depository Bank, City, State, and date	Cleared		Amount	Designation
1518	Riggs National Bank, Wash, DC	**Oct 5**	**Oct 6**	$69.064.94	NSF
1540	Chevy Chase Bank, Laurel, MD	**Oct 5**	**Oct 6**	$34,745.95	Uncollected
1519	Citibank, FSB, Wash, DC	**Oct 5**	**Oct 6**	$ 2,460.00	Uncollected
1490	First National Bank of Maryland	**Oct 6**	**Oct 6**	$ 2,300.00	Uncollected
1535	Nationsbank, Baltimore, MD	**Oct 5**	**Oct 6**	$ 405.62	Uncollected
1530	Nationsbank, Baltimore, MD	**Oct 3**	**Oct 6**	$ 152.00	Uncollected
1487	Citizens Bank of MD, Laurel, MD	**Oct 3**	**Oct 6**	$ 150.00	Uncollected
1501	Citizens Bank of MD, Laurel, MD	**Oct 3**	**Oct 6**	$ 150.00	Uncollected
1512	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1467	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1448	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1412	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1382	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1370	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1390	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1523	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected

1532	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1478	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1346	Citizens Bank of MD Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1434	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1422	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1546	Citizens Bank of MD, Laurel, MD	**Oct 5**	**Oct 6**	$ 150.00	Uncollected
1499	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 130.00	Uncollected
1543	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 125.00	Uncollected
1485	Nationsbank, Baltimore MD	**Oct 6**	**Oct 6**	$ 124.00	Uncollected
1510	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 123.00	Uncollected
1529	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 69.00	Uncollected
1483	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 25.00	Uncollected
1509	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 25.00	Uncollected
1494	Nationsbank, Baltimore, MD	**Oct 6**	**Oct 6**	$ 25.00	Uncollected

The Court of Special Appeals in affirming the trial court's striking of the Second Amended Complaint as barred by the statute of limitations and prejudicial to the bank to require it to prepare a defense to the RICO charges when the trial was scheduled for the following week, never mentions why RICO was filed as set forth from the bank's own internal manual provisions at oral argument, nor does it mention that the checks were not lawfully dishonored by the effects of the double posting of the improperly certified check as falsely pleaded but due to the reversal of UCC Paid items and the aggregating of overdrafts in violation of federal law. Further, in affirming the trial court's decision, the Court of Special Appeals stated that the Second Amended complaint was filed long after the close of discovery and one week before trial. Even though the Court was in error in that the Second Amended complaint was filed April 4, 2001, 43 days prior to trial, the timing of the filing due to Respondent's thwarting of discovery was exactly the question asked on appeal to the Court of Special Appeals and Court of Appeals. Even though the federal violation was discovered in the "retail" provisions of the manual, both courts chose to remain fully and completely silent on the discovery abuses complained of at the trial court, sanctions for which remained unheard by the trial court prior to trial for nonproduction of sections of the "retail" provision of the manual compelled and deemed by Respondent **after court compelled** to be "irrelevant".(See Footnote 4 referencing Second Supplemental Answer to Plaintiff's Interrogatory No. 2, filed by Respondent May 8, 2001- 13 days before trial) Further, the Court of Special Appeals opined on a different question than was presented by Petitioner.

The question presented by Petitioner was: Did the trial court err in dismissing the Plaintiff's Second Amended Complaint filed over 30 days prior to trial, on the grounds of the statute of limitations and prejudice to the Defendant when the prejudice (if any) was created by Defendant's thwarting of request for production of documents? Instead, the Court of Special Appeals opined on a very different question, which removed all issues of the thwarting of discovery by Defendant and is no where

dealt with in their opinion as follows: Whether the trial court abused its discretion in striking Mrs. Bennett's second amended complaint on the ground it would prejudice defendant? (Appendix (Pet. App.) 2a-11a)

These discovery abuses that the Court failed to acknowledge in their opinion, was discussed at length in the petition, argued before them and was crucial to the determination of the timing of the Second Amended Complaint which the Court of Special Appeals affirmed as being prejudicial and statutes of limitation barred.

The trial court judge, Thomas P. Smith, who heard 3 hearings on discovery issues related to the facts at issue in the discovery abuses claimed by Petitioner stated in the April 24, 2001 motions hearing in which he received notice of the federal violation of reversals of UCC Paid items on Petitioners' account stated that he would personally resolve the Motion to Strike the Second Amended Complaint.

Judge Smith, however, deferred ruling on the Motion to strike the Second Amended Complaint to Judge Lamzell Martin, after stating in open court that he was to personally rule on the matter. Judge Smith had heard three (3) discovery motions hearings for discovery issues including, affidavits of "loss of personnel files" (Krystal Fadely and Dwight Clarke), failure to provide addresses and phone numbers of participating bank officers, and delay in the production of the compelled manuals.More importantly, Judge Smith knew and espoused that the dishonors as pleaded by Respondent was due to the hole not being punched in the certified check as commented to in the October 20 and January 10 motions hearings. Commenting

The Court:

All right. That is all the facts they have. That is all the facts they will be entitled to proceed with, as when and if this case is resolved. The fact that you believe there are other facts, that they are hiding things, and I get that from, from, from the sentence rather than from anything you have said, is a matter you and the finder of fact, be it a judge or arbitrator, will have

to resolve. . . The are not going to be able, in the phrase of Walt Garrison however, to stray off the ranch.

Judge Smith learned in the motions hearing on April 24, 2001 that the true cause as revealed by the banks own policy manual was reversal by bank officers of UCC Paid items which are federally mandated on Petitioners Commercial Account and not the lawful effects of an improperly certified check, yet despite his familiarity with the facts he deferred a decision on the Motion to Strike the Second Amended Complaint to Judge Larnzell Martin, who was unfamiliar with the discovery issues of this case.

Judge Larnzell Martin, unfamiliar with the discovery thwarting, but familiar with both the reversal of UCC Paid Items as presented in the Second Amended Complaint and exhibits to the Second Amended Complaint and the allegation by Petitioner of Bank Fraud (Appendix (Pet App.) 26a), hearing the Motion to Strike the Second Amended Complaint asked for Respondents' defense counsels response to the dual system of final payment and incredibly struck the complaint as prejudicial after hearing the following:

Defense Counsel

Your Honor, the issue about these dual systems. The Plaintiff somehow suggests that it is – it is relevant. The Plaintiff herself said, I Didn't know about the UCC requirements until some years after I filed the complaint. That is not the banks problem that she didn't know that."

The violation of the UCC was discovered in the retail overdraft section of the manual, yet the trial court prior to trial left unheard a Motion for Sanctions for failure of Respondent to comply with the courts October 20, 2000 order to compel the entire manual. The piecemeal approach of Respondent to hinder legitimate discovery requests is shown by the Second Supplemental Answer to Plaintiff's Interrogatory No. 2 filed

May 8, 2001 (13 days before trial) concerning outstanding portions of the manual[5]

This type of litigation strategy was employed from the outset of litigation and was condoned by the trial court. The trial court in fact never addressed the Motion For Sanctions for the October 20, 2000, court compelled teller settlement records of Krystal Fadely, which by law they must retain, which would show the federal settlement requirement of the second improper debit caused by the improperly certified check, which was the guise and false pretense used to legitimize the removal of Attorney client funds in the custody of a federally insured institution.[6] [7] [8]

---

5. The Defendant, First National has located Sections BR-097A and BR-097B of the 1995 Allfirst Policy Manual and is producing copies of the same herewith . . . The remaining sections that plaintiff seeks, sections 1328, 1328 A and 1328 B, relate to retail checking accounts. The Plaintiff held a commercial checking account with Allfirst Bank and these sections are inapplicable and irrelevant."

6. October 13, 2000 defense counsel letter:

"Finally with regard to teller reports that you are seeking, your request does not give Allfirst Bank adequate notice of the type of report which you seek. Regardless, there are no reports prepared by tellers which have any relevance to this matter."

October 20, 2000 Motion To Compel Hearing:

The Court: You do not need all daily or weekly reports for the teller working at the office at issue

Ms. Bennett: Just Crystal Fadely

The Court: At best you need just one.

Ms. Bennett: Yes Sir. Just Crystal Fadely.

7. Defendant's Response to Plaintiff's Second Request For Production of Documents dated November 2, 2000:

Response: Subject to the foregoing objection and pursuant to the Plaintiff's statement in open Court that she seeks only reports relating to Krystal Fadely, the Defendant, First National, states that it will produce for inspection and copying any and all reports that it can identify, in its possession or control, for the month of October 1995 for the branch in question.

8. May 8, 2001 **(13 days before trial)**

Defendant's Supplemental Response to Plaintiff's Second Request For Production of Documents: (Cont'd)

Further, Judge Larnzell Martin struck the Second Amended complaint in its entirety including the cause of action for the Maryland Consumer Protection Act specifically enacted for unfair or deceptive trade practices of the UCC (Appendix (Pet App) 32a) and thus foreclosed Petitioner from refuting the trial judge's finding noted as follows:

(Appendix (Pet. App.) 13a)

The Court:

— so I do not see any deception. I do not see any intentional fraud or anything of that nature . . .

(Appendix (Pet. App) 15a)

The Court:

In this case the bank made a mistake by failing apparently to punch a hole in a check which would have identified it as a certified check. This check was presented to the bank by plaintiff, Kimberly Bennett. It was in the amount of $104,819.56.

And it was debited to her account twice, which caused severe overdrafts in her escrow account

In fact the trial Court, evidenced by its opinion was quite confused about the improperly certified check's effect on the escrow account (Appendix (Pet. App.) 15a)

The Circuit Courts' determination to remove this case statistically from their docket instead of giving a continuance to afford Respondent a right to answer the Second Amended

(Cont'd)

> The Defendant, Allfirst Bank has reviewed its files regarding the Plaintiff's request. There are no daily or weekly reports prepared by tellers. There is a ticker tape that is prepared mechanically as the teller enters transactions throughout the day. The ticker tape does not contain any decipherable language as the information input onto the tape is recorded in a code. All relevant information is then transferred from the tape into account records of various bank customers. All relevant account statements have been produced and are in the record in this matter. Allfirst Bank has been unable to locate the (ticker)?? Tape for Crystal Fadely from October 2, 1995.

Complaint for the federal law violation can best be seen from Judge Smith's January 10, 2001 (prior to production of the Manuals) comments:

The Court:

. . . Now I know Counsel is familiar with the Court's continuance policy. I want to go over it with you. Do you understand the Court's continuance policy?

Ms. Bennett: No, Your Honor.

The Court: Succently stated, if you have a pulse, you have a trial. We do not continue cases period.

Ms. Bennett: Yes, Sir.

The trial Court denied the Second Amended Complaint and allowed trial to proceed only on the damages issue of Section 4-402 Wrongful Dishonor for which Respondent had admitted liability for wrongful dishonor.

The Court of Special Appeals, having an affirmative **duty** based on the law to reverse trial courts rulings that are clearly erroneous and was substantiated by the banks own policy provisions of the violation of federal law, affirmed the trial courts prejudicial finding and further added a statute of limitations bar refusing to recognize the Fraudulent Concealment Doctrine applicable to the RICO cause of action, i.e. that the 32 dishonors were not legitimately caused by the effects of an improperly certified check as pleaded by the Respondent and answered in interrogatories but were the true result of reversal of UCC Paid Items- federally mandated items (said pleadings and interrogatories answered *after the Federal Compliance of making UCC Paid items irreversible by bank officers on Commercial accounts thus negating any prejudice in having to defend against the Second Amended Complaint filed 2 years and 7 months after the subsequent remedial measure was enacted.*) The remedial measure shows that with federal compliance, 31 checks would have been paid irrespective of the results of an improperly certified check used as a guise to take property from a federally insured institution by false pretenses. The law of the UCC did not change since 1995,

Respondents' compliance with the law changed. However, as discussed in **Reasons for Granting the Writ**, Respondent continues to contend that in 1995, $65,555.08 was "insufficient" to pay 31 checks totaling $41,609.57. And the Court of Special Appeals sanctioned this as legitimate when they found "On October 6, 1995, the bank returned a series of thirty two checks written on Mrs. Bennett's account as unpaid because there were insufficient funds in her account to cover the checks" (Appendix (Pet. App.) 4a). This premise is final payment based on aggregating overdrafts as bank officers testified was the system employed by the bank in 1995 and was a willful and deliberate federal violation of "final payment". With the gravity that is before Respondent and those perpetrating this fraud involving funds in the custody of a federally insured institution, Petitioner now fully recognizes the great lengths which have been resorted to in concealing this "Corporate Corruption" perpetrated upon unknowing consumers such as herself.

REASONS FOR GRANTING THE PETITION

The trial court and the Court of Special Appeals, in ruling prejudice and the Statute of limitations bars have confined a federal right (RICO) within the terms of a state statute of limitations and refused to acknowledge and sustain the federal equitable doctrine as to fraud. The Supreme Court has stated that the fraudulent concealment doctrine is to be "read into every federal statute of limitation." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). As in *Holmberg,* this case raises a question of considerable importance in enforcing liability under a federal equitable enactment involving admitted violations by bank officers of a system of reversing UCC Paid items and the aggregating of overdrafts in violation of federal law and thus, The National Bank Act. The judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Banking Act involve decisions of a "federal" and not a "state question." 12 U.S.C.A § 21 *et seq*.

To insure performance of these duties and as a safeguard to creditors and the public, violation of

> the provisions of the Act by any director or officer of the bank or by any person aiding or abetting him, is made a criminal offense,12 U.S.C.§ 592, 12 U.S.C.A. § 592, **Section 592, R.S. § 5209; Acts Sept. 26, 1918, c.177, § 7, 40 Stat. 972; Aug. 23, 1935, c. 614, § 316, 49 Stat. 712, relating to embezzlement, is now covered by §§ 334, 656, and 1005 of Title 18; Crimes and Procedure (§§ 656 and 1005 printed in Appendix(Pet. App.) 52a-55a)**, and in the event of such violation, the association may be required to forfeit all its rights and privileges,12 U.S.C. § 93, 12 U.S.C.A. § 93.
>
> Bank directors have a duty to act as prudent and diligent persons would act in safeguarding the bank's property, complying with state and federal banking statutes and determining that bank officers run the bank properly and are held to stricter rules since banks handle depositors money. *Briggs v. Spaulding*, 141 U.S. 132 (1891)

Review should be granted because of the importance of this violation to the National Bank Act (12 U.S.C. A. § 21 *et seq.*) which constitutes "by itself a complete system for the establishment of national banks." *Cook County National Bank v. United States*, 107 U.S. 445 (1882) In addition to the sections of the act conferring on national banking associations the authority to conduct a public banking business, the Act contains numerous provisions designed for the protection of bank depositors and creditors. Allfirst Bank, formerly known as First National Bank of Maryland, at the time of the events at issue, was a national bank subject to, and governed by the National Bank Act.

> 18 U.S.C.A. § 1344(a) reads:
>
> Whoever knowingly executes, or attempts to execute, a scheme or Artifice —
>
> (1) to defraud a federally chatered or insured financial institution;

> (2) or to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years or both.

Secondly, review should be granted because "sufficiency" of funds for final payment is a federal question. And as the question of whether $65,555.08 was "insufficient" per the pleadings of the Respondent to pay 31 checks totaling $44,609.57 is determined by federal law, when the period starts to run for statute of limitations purposes under RICO is also a federal question.

Respondent in Allfirst's Answer to Petition for Writ of Certiorari to the Court of Appeals of Maryland, none-the-less continues the espousing of the violation of federal law in final payment as legitimate:

> As set forth, above, Allfirst has always admitted that it wrongfully dishonored checks written on the Petitioners Account. Allfirst has maintained that by failing to punch a hole in the MICR line in the certified check, that the Petitioner's account was improperly debited twice for the same check, thereby causing the artificially low balance and wrongful dishonors that should have been paid. The trial court also specifically found that Allfirst's failure to punch the hole proximately caused the checks to be dishonored. (Allfirst's Answer to Petition for Writ of Certiorari to the Court of Appeals page 13)

They further state under *UCC issues raised in the Petition* (Allfirst's Answer page 13)

> If the Petitioner is correctly stating the UCC requirements, she is simply stating another basis

> upon which it can be found that Allfirst wrongfully dishonored checks 2-32. Allfirst has always admitted that it wrongfully dishonored checks 2-32, as well as the first check. **It is irrelevant whether or not there is a second explanation for why the dishonors were wrongful.** (emphasis added)

Respondent's disrespect for federal law is evident in their cavalier disposition that the deliberate and consistent violation of federal law and reversing of UCC Paids is merely an explanation. An explanation is an understatement as to the accounting this Corporation owes this Court, Petitioner, and all commercial account holders affected by a system which willfully violated federal law. Moreover, General Counsel in the case of Petitioner used the U.S Postal service to send letters to clients using a false pretense to conceal this federal violation which obtained money in the custody of a federally insured institution in violation of the Bank Fraud Statute, 18 U.S.C.A. § 1344(1) and (2). I would also like to remind the Court that Allfirst Bank is the Corporation where another security licensed individual, foreign trader, John Rusnik, lost million dollars of the bank's money based on the "lack" of internal controls employed by the bank. Petitioners case represents "known violation" of law as evidenced by their compliant Retail System which made UCC Paid items irreversible in 1995.

The validity of final payment as deceptively pleaded by defendant and upheld by the trial court and the Court of Special Appeals is repugnant to federal law, and therefore a substantial federal question was presented in the Second Amended Complaint. The United States Supreme Court, in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), established its power to review state court decisions in cases involving matters of federal law. The Court of Appeals Opinion (Appendix (Pet. App) 4a) states:

"On October 6, 1995, the bank returned a series of thirty-two checks written on Mrs. Bennett's account as unpaid because there were insufficient funds in her account to cover the checks"

This gives validity to the banks noncompliance with federal law in the reversals of UCC Paid items on Petitioners Escrow account and the unlawful system of aggregating overdrafts as deliberately and consistently employed by the officers of the bank in violation of the National Bank Act.

As in the case at issue, the purpose of the fraudulent concealment doctrine is "to prevent a defendant from ' concealing a fraud, or . . . committing a fraud in a manner that it concealed itself until the defendant' could plead the statute of limitations to protect it." *Supermarket of Marlinton v. Meadow Gold Dairies*, 71 F.3d 119, 122 (4th Cir. 1995). The discourse of Respondents' counsel, in the hearing on the Motion to Strike the Second Amended complaint, regarding the very issue invoking this rule is found in (Appendix (Pet. App.) 29a-30a).

> Where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute of limitations does not run until the fraud is discovered though there be no special circumstances or efforts on the party committing the fraud to conceal it from the knowledge of the other party." *Bailey, Assignee v. Glover*, 88 U.S. 342, 348 (1874)

In *United States v. Morgenstern*, 933 F.2d 1108 (2d Cir. 1991), the Court found that the federal bank fraud statute applies to taking of property from banks by false pretenses, whether that property includes funds maintained in bank accounts for customers or property over which bank has physical control. 18 U.S.C. (1988 Ed.) § 1344(2). Two major considerations emerge from the legislative history of the federal bank fraud statute. First, Congress expressed an intent to "protect [] the financial integrity of these institutions, and . . . assure a basis for the Federal prosecution of those who victimize these banks through fraudulent schemes." S. Rep. No. 225, 98th Cong., 2d Sess. 377 (1983), reprinted in, 1984 U.S. Code Cong. & Admin. News 3182, 3517; see H.R. Rep. No. 901, 98th Cong., 2d Sess. 2-6 (1984) *United States v. Blackmon*, 839 F.2d 900, 905-06

(2d Cir. 1988). It was Congress' intent that a federally insured or chartered bank must be the actual or intended victim of the scheme. *See United States v. Morgenstern*, 933 F.2d. 1108, 1112 (2d Cir.1991); *Blackmon*, 839 F.2d at 906.

The Court in *United States v. Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992), *cert. denied*, states

> This much is clear: a conviction under the "scheme to defraud" clause of the bank fraud statute requires that the defendant engage in or attempt to engage in a pattern or course of conduct designed to deceive a federally chartered or insured financial institution into releasing property with the intent to victimize the institution by exposing it to actual or potential loss.

In *Quick v. Peoples Bank of Cullman County*, 993 F.2d 793 (11th Cir. 1993), the Court found that the "bank was liable based on *respondeat superior* doctrine for loan officer's violation of federal Racketeer Influenced and Corrupt Organizations Act, even if bank was initially unaware of violations, where violations were incident to loan officers assigned duties and took place during bank business hours, officer had been assigned function of making loans and wrongful activities, bank acquiesced in violations by requesting that debtors sign consolidation note including amounts fraudulently taken by loan officer, and accepted benefit of wrongful activities by keeping interest on additional debt incurred by debtors.

"Scheme to defraud" within bank fraud statute is not capable of precise definition but is measured in particular case by determining whether scheme demonstrated departure from fundamental honesty, moral uprightness or fair play and candid dealings in the general life of the community. *United States v. Ragosta*, 970 F. 2d 1085 (2d Cir. 1992), *cert. denied*. The balance in the account was in fact sufficient per federal law to pay 31 of 32 of the checks deceptively dishonored, and the lawful results of the improperly certified check had no effect on the federally

mandated payment of 31 checks had the officers of the bank not been utilizing an unlawful aggregate system of final payment.

Misrepresentation must be material in order to give rise to liability under the bank fraud statute. *United States v. Davis*, 989 F.2d 244 (7th Cir. 1993). Yet incredibly, the trial court hearing a Motion to strike RICO heard of the dual system of final payment and struck the Second Amended Complaint in its entirety including the state cause of action for breach of the Maryland Consumer Protection Act which specifically provides a cause of action for the deceptive wrongful dishonor of the Uniform Commercial Code. Instead the Court found prejudice to the Defendant in spite of the discovery abuses and Motion for sanctions for continued nonproduction of court compelled documents which remained unheard at trial, inclusive of Krystal Fadely's teller records for the month of October 1995 which disclosed the offsetting debit required for federal Settlement requirements of the October 4 double debiting of the improperly certified check which remained out of the escrow account and in an internal account of Allfirst bank for 14 days.

For purposes of the federal bank fraud statute, terms "scheme" and "artifice" include any plan, pattern or cause of action including false or fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value, such as money, from institution to be deceived. Materiality of falsehood is element of federal mail fraud, wire fraud and bank fraud statutes. *Neder v. U.S.*, 527 U.S. 1 (1999).

How much more material can it be, when the direct injury to Petitioner was due to the reversals of federally mandated UCC Paid Items and not the lawful results of an "insufficient balance" created by the effects of an improperly certified check as contended by Respondant of **31** dishonored checks? Yet incredibly, the trial court hearing from defense counsel that ". . . the issue about these dual systems. The Plaintiff somehow suggests that it is – that this is relevant. The Plaintiff herself said, I didn't know about UCC requirements until some years

after I filed the Complaint. That is not the bank's problem that she didn't know that", thereafter, struck the Second Amended Complaint in its entirety and allowed trial to proceed only under the damages issue of § 4-402 – Wrongful dishonor. Respondant having already admitted liability, the effects of the admission of liability and the striking of the Second Amended Complaint in its entirety, including the RICO and the Maryland Consumer Protection Act causes of action, effectively forclosed Petitioner from being able to present the deceptive nature of the dishonors resulting from the federal law violation.

A look at case law analysis to the material misrepresentation presented in this case is appropriate: *United States v. Bonnett*, 877 F.2d 1450 (10th Cir. 1989). Use and treatment of series of worthless checks by immediately crediting depositor when it was known checks were drawn on sufficient funds constituted false representation designed to give impression to bank to which checks were deposited that checks were drawn on collectible funds and would support conviction for obtaining monies or other property of federally insured financial institution by means of false representations; the misrepresentation was not implied representation that checks were good, but conduct of conspirators in acting as if checks were good.

United States v. Ratchford, 942 F.2d 702 (10th Cir. 1991), *cert denied.* Defendant's convictions on three counts of bank fraud were supported by sufficient evidence, despite defendants contention that his bank accounts, when combined, contained sufficient funds on later date to cover checks forming basis of the three counts; relevant inquiry was whether defendant knowingly had sufficient funds in accounts being utilized on day checks were written, and amount contained in those accounts on later date was irrelevant.

CONCLUSION

I respectfully ask this Court to make Respondent answer the question as to whether with compliance of federal law as now evidenced in their Commercial Overdraft System and procedures, 31 checks would have been dishonored on Petitioners Account in 1995.

I further request this court to remand this case back to the Circuit Court for Prince George's County for a trial on the merits of RICO based on the two predicate acts of Bank Fraud 18 U.S.C.A. §§ 1344(1) and (2) and Mail Fraud 18 U.S.C. § 1341 as committed by the General Counsel of Allfirst Bank, Nancy Miller, Esq.

Lastly, I request this Court to admonish the Circuit Court of Prince George's County, where Allfirst Bank, literally has a branch in close proximity to the Court house to fully examine the Motion for Sanctions for failure of Respondents to produce October 20, 2000 Court Compelled production of documents and to sanction until Respondant complies with the Court's order.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KIMBERLY LACEWELL BENNETT
ATTORNEY AT LAW, *Pro Se*
12138 Central Avenue, #343
Mitchellville, MD 20721
(301) 440-8788

APPENDIX A — ORDER OF THE COURT OF APPEALS OF MARYLAND DENYING PETITION FOR REHEARING DATED SEPTEMBER 12, 2002

IN THE
COURT OF APPEALS
OF MARYLAND

Petition Docket No. 291
September Term, 2002

(No. 931, Sept. Term, 2001,
Court of Special Appeals)

KIMBERLY LACEWELL BENNETT

v.

ALLFIRST BANK, formerly known as
THE FIRST NATIONAL BANK OF MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: September 12, 2002

APPENDIX B — OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND DATED AND FILED MAY 29, 2002

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 931

September Term, 2001

KIMBERLY LACEWELL BENNETT

v.

ALLFIRST BANK, formerly known as THE FIRST NATIONAL BANK OF MARYLAND

Eyler, James R., Sonner, Thieme, Raymond G., Jr., (Retired, specially assigned), JJ.

Opinion by Sonner, J.

Filed: **May 29, 2002**

This case arises from a lawsuit filed in the Circuit Court for Prince George's County by Kimberly Lacewell Bennett, Esq., against AllFirst Bank because of the bank's mishandling of a certified check in October 1995.[1] Mrs. Bennett's original complaint alleged causes of action for negligence, wrongful dishonor, breach of contract, tortious breach of contract,

1. AllFirst Bank was known, at the time the events of this case took place, as First National Bank of Maryland.

and defamation. After the close of the discovery period in this case, Mrs. Bennett filed two amended complaints: one alleging racial discrimination, and a second asserting a federal racketeering claim. Upon motions from the bank, the trial court struck both amended complaints, as well as the negligence, tortious breach of contract, and defamation claims. After a trial on the merits of Mrs. Bennett's breach of contract and wrongful dishonor claims, the trial court found that Mrs. Bennett did not suffer any direct damages; however, it did award her $3,000 for emotional harm. On appeal, Mrs. Bennett raises the following issues:

1. Whether the trial court abused its discretion in striking Mrs. Bennett's claim for racial discrimination on the ground that it did not relate back to her original cause of action.

2. Whether the trial court abused its discretion in striking Mrs. Bennett's second amended complaint on the ground it would prejudice the defendant.

3. Whether the trial court erred in denying Mrs. Bennett a jury trial.

We find no error and affirm.

Appendix B

Factual Background

On October 2, 1995, Mrs. Bennett presented the bank's Inglewood branch with a certified settlement check for $104,819.56. Proper handling of this check required "punching a hole in the MICR line" on the check; however, Krystal Fadely, one of the bank's tellers, failed to punch the requisite hole on the check. Because the hole had not been punched, the check was processed as a noncertified check and was paid out of Mrs. Bennett's account, not out of the bank's certified check suspense account. When the certified check later arrived, the bank debited Mrs. Bennett's account again for the same check.

On October 6, 1995, the bank returned a series of thirty-two checks written on Mrs. Bennett's account as unpaid because there were insufficient funds in her account to cover the checks. After returning from vacation on October 16, 1995, Mrs. Bennett discovered that the checks had been dishonored. Mrs. Bennett went to the Inglewood branch and researched account records to determine what had happened. Dwight Clark, a representative of the bank, eventually discovered that the teller had failed to punch a hole in the certified settlement check.

The next day, October 17, the bank credited Mrs. Bennett's account for the amount of the certified check and agreed to honor all of the returned checks and pay the bank fees associated with them. On November 8, 1995, the bank sent apology letters acknowledging its error to all the payees of the returned checks and others Mrs. Bennett identified.

Appendix B

Almost three years later, on September 30, 1998, Mrs. Bennett filed her original complaint. On December 6, 2000, she filed an amended complaint, stating a claim for racial discrimination based upon 42 U.S.C. Section 1981.[2] On April 5, 2001, she filed a second amended complaint, asserting a federal claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), pursuant to 18 U.S.C. Section 1961. After a hearing on May 17, 2001, the trial court granted the bank's motion to strike both amended complaints. A trial on the remaining issues commenced on May 21, 2001.

Discussion

I. *The First Amended Complaints*

It is clear that Maryland trial judges have discretion to strike amendments to pleadings. *See, e. g., Crowe v. Houseworth*, 272 Md. 481, 489, 325 A.2d 592 (1974); *First Wholesale Cleaners, Inc. v. Donegal Mut. Ins. Co.*, 143 Md. App. 24, 41, 792 A.2d 325 (2002) (citation omitted). The exercise of that discretion will not be overturned on appeal unless the trial judge abuses that discretion. *Baer v. Baer*, 252 Md. 586, 589-90, 250 A.2d 897 (1969). Trial judges should freely allow amended complaints to serve the ends of justice to ensure that cases are decided upon their merits. *Hall v. Barlow Corp.*, 255 Md. 28, 39-40, 255 A.2d 873 (1969); *Preissman v. Harmatz*, 264 Md. 715, 720, 288 A.2d 180 (1972). Such allowance is not unlimited, however. When a party files an amended complaint alleging a new cause of action, the trial

2. Mrs. Bennett, an African-American attorney, practiced real estate law in Prince George's County.

court may strike it if it does not relate back to the original complaint or does not give the defendant proper notice of the charges it must defend. Here, the trial judge granted the bank's motion to strike the first amended complaint because nothing in the original complaint even hinted at Mrs. Bennett's section 1981 claim, and also because that claim did not relate back to the original complaint.

Of all purposes for pleadings, notice is paramount and a fundamental principle of procedural law. *Scott v. Jenkins*, 345 Md. 21, 28, 690 A.2d 1000 (1997). In the instant case, Mrs. Bennett's original complaint did not allege or suggest racial discrimination. It did not even state that she was a member of a protected class. It did not assert any facts that the bank did or said anything that amounted to discrimination against Mrs. Bennett. Until Mrs. Bennett filed her first amended complaint, two years after she filed her original complaint and over five years since the events occurred, the bank was defending itself against ordinary negligence, breach of contract, and wrongful dishonor charges. Based on these facts, the trial judge correctly found nothing in Mrs. Bennett's original complaint that gave the bank any notice of a potential racial discrimination lawsuit.

The trial judge also struck the first amended complaint because it did not "relate back" to the original complaint. Unlike the federal rule, Maryland's amendment rule does not contain a relation back provision. *See* Md. Rule 2-341 (2001); *Grand-Pierre v. Montgomery County*, 97 Md. App. 170, 174, 627 A.2d 550 (1993). Maryland case law provides, instead, that when an "amendment sets forth a new cause of action, then limitations is measured from the time of the accrual of

the cause to the date the amended [complaint] is filed." *Myers v. Aragona*, 21 Md. App. 45, 51, 318 A.2d 263 (1974)(citation omitted). This principle requires us to determine the amended complaint's "retrospective effect;" that is, whether or not the amended complaint sets forth a new cause of action.

To do that, we look first at the underlying facts actually pled in the original complaint. This analysis strongly supports the bank's position that Mrs. Bennett's claim is not entitled to retrospective effect. For instance, in *Morrell v. Williams*, 279 Md. 497, 506-508, 366 A.2d 1040 (1976), the Court of Appeals held that an amended claim, which required different elements of proof and involved a different measure of damages, set forth a new cause of action that was barred by the statute of limitations. In *Gensler v. Korb Roofers, Inc.*, 37 Md. App. 538, 543, 378 A.2d 180 (1977), this Court held that an amended complaint that asserted a new cause of action was barred by the statute of limitations. These cases clearly indicate that causes of actions based upon the same set of facts, but requiring different elements of proof, constitute distinct and separate causes of actions.

Although Mrs. Bennett's racial discrimination claim concerned the same operative facts as the original complaint, her Section 1981 claim involved vastly different elements of proof and a different measure of damages. To begin with, to succeed on a Section 1981 claim, Mrs. Bennett needed to prove that she suffered intentional racial discrimination. *Chambers v. Omaha Girls Club*, 629 F.Supp. 925, 932 (Ne. 1986), *aff'd*, 834 F.2d 697 (1987). Mrs. Bennett's first amended complaint, therefore, was not a change in the form of the pleading, but, rather, a major change in substance.

Morrell, 279 Md. at 508. Accordingly, we find that the trial court properly exercised its discretion in granting the bank's motion to strike the first amended complaint.

II. *Second Amended Complaint*

Mrs. Bennett's second amended complaint sets forth federal RICO charges. The RICO statute originally was enacted as a tool to help law enforcement eradicate organized crime. *Alexander v. U.S.*, 509 U.S. 544, 561, 113 S.Ct. 2766, 125 L.Ed.2d. 441 (1993). RICO imposes criminal and civil liability on those who engage in criminal enterprises and a pattern of racketeering activity. *See* 18 U.S.C. §§ 1961-1968. To prove that the bank engaged in a pattern of racketeering activity under RICO, Mrs. Bennett must prove that the bank committed at least two acts of racketeering activity within a ten-year period, that the acts were related to the same enterprise, and that the racketeering activity posed a threat of continued criminal activity. *H. J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 232-34, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). RICO is a drastic remedy; it includes criminal penalties and treble damages. *Id.* At 232-33. For that reason, those making such charges have a much greater burden of proof than those seeking redress for a negligent handling of a depository account.

At the hearing on the motion to strike this amendment, the bank made the same arguments that it did in opposing the first amended complaint. The bank argued that the statute of limitations on RICO cases was three years, and that Mrs. Bennett filed her amended complaint five-and-one-half years after the relevant events occurred. The trial court,

however, struck Mrs. Bennett's second amended complaint, because it found that it would have been prejudicial to the bank to require it to prepare a defense to the RICO charges when the trial was scheduled for the following week. The court indicated it was reaching this decision on the prejudice issue, "aside from the Statute of Limitations."

We find that the trial court correctly struck the second amended complaint for either of these reasons. The second amended complaint was filed long after the close of discovery and one week before trial. There had been no discovery on the RICO issues. It would have been prejudicial to the bank to require it to defend itself against RICO charges brought only one week before trial.

To the extent that the trial court also relied on the fact that the second amended complaint was filed outside the statute of limitations, the trial court was again properly exercising its discretion. As noted above, an amended complaint that asserts a new cause of action is not entitled to retrospective effect. Here, Mrs. Bennett's RICO charges involved substantially different elements of proof and carried a more severe measure of damages. The trial court properly found that this amended complaint was barred by the statute of limitations.

Appendix B

III. *Jury Trial Reauest*

Mrs. Bennett alleges that the trial court erred in denying her a jury trial, pursuant to the Seventh Amendment of the U.S. Constitution. The U.S. Supreme Court, however, has consistently held that the Seventh Amendment was not incorporated into the Fourteenth Amendment, and, consequently, is not applicable to the states. *See Bringe v. Collins*, 274 Md. 338, 341-42, 335 A.2d 670 (1975) (citations omitted). In Maryland, Mrs. Bennett's right to a jury trial is protected by Article 23 of the Maryland Declaration of Rights. That right, however, is subject to reasonable restrictions. *See Houston v. Lloyd's Consumer Acceptance Corp.*, 241 Md. 10, 14, 215 A.2d 192 (1965) (holding that right to jury trial not violated by requiring a timely written election).

Maryland Rule 2-325 (a) provides:

> Any party may elect a trial by jury of any issue triable of right by a jury by filing a demand therefor in writing either as a separate paper or separately titled at the conclusion of a pleading and immediately preceding any required certificate of service.

Here, Mrs. Bennett did not request a jury trial in the complaint; instead, she claims that she satisfied the rule by checking the jury trial box on a civil information report. We find that method of requesting a jury trial to be insufficient and not in compliance with the rule. As the bank points out, Ms. Bennett is a licensed attorney in this State, and she was represented by counsel when the complaint was filed.

Appendix B

The proper way to request a jury trial is outlined in Rule 2-325, and knowledge of the procedure is attributable to both the plaintiff and her attorney. Ms. Bennett's failure properly to request a jury trial led the trial court and the bank to expect a bench trial. The court properly denied the tardy request.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX C — REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS (TRIAL) DATED MAY 21, 2001

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

Civil Action Trial No. 98-20587

KIMBERLY LACEWELL BENNETT,

Plaintiff

v.

FIRST NATIONAL BANK OF MARYLAND,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF
PROCEEDINGS
(TRIAL)
(Volume I of I)

Upper Marlboro, Maryland
May 27, 2001

BEFORE:

HONORABLE JAMES J. LOMBARDI

* * *

[167] under deceptive trade practices acts.

THE COURT: We do not have that here, —

MR. TRACY: Well, I —

THE COURT: — so I do not see any deception. I do not seen any intentional fraud or anything of the nature. All we have is this, the remedies for dishonor —

MR. TRACY: Right.

THE COURT: — of breach, which allows actual damages. There is none. Plus consequential damages. So does this not come down to whether or not these are reasonably foreseeable consequential damages, and whether there is a causal connection?

MR. TRACY: I do believe that is a correct analysis, Your Honor. And I think that the *Dobbins*, the *Dobbs* case provides a road map. And so does *Hannah*. *Hannah* was an intentional tort. *Dobbs* makes the distinction, and so does *Hannah*, between intentional torts and negligence.

THE COURT: Your answer is, no. You do not think?

MR. TRACY: Well I think your analysis is correct. But applied to these facts, I do not think with any proximate, any proof of proximate cause. I do think —

THE COURT: Well, you have the temporal element. All this happened quickly after she found out about it, —

Appendix C

MR. TRACY: Well I think that the problem —

THE COURT: for the most part. I mean I know

* * *

[178] cancer. The objective manifestations that the court allowed, or the court ruled could show emotional distress where fatigue, sleeplessness, constipation and mood change, which mood change would be what was described in terms of plaintiff's buoyant, buoyant, buoyancy about her business and the vacation. And the Court specifically held that in this case these things could be found by the fact finder without expert testimony. So that in terms of —

THE COURT: Including loss of weight and no sleeping.

MR. PRESSMAN: And, okay

THE COURT: I read the case.

MR. PRESSMAN: Right.

TIDE COURT: Yes, I have it.

MR. PRESSMAN: Right. So I think in terms of —

THE COURT: I agree with you.

MR. PRESSMAN: In terms of Maryland law this, this, okay. Thank you.

Appendix C

THE COURT: In this case the bank made a mistake by failing apparently to punch a hole in a check which would have identified it as a certified check. This check was presented to the bank by plaintiff, Kimberly Bennett. It was in the amount of $104,819.56. And it was debited to her account twice, which caused severe overdrafts in her escrow account.

[179] The plaintiff had a thriving settlement business as a title agent. Had a number of clients. And on this particular occasion after conducting one of her settlements, and depositing a certified check, and writing checks out of her account on that certified check, on the strength that the certified check would be deposited into her account, wrote checks do her escrow account in the sum of thirty-one of them. Seemed to have been dishonored. Understandably the people to whom those checks were written were very upset.

As it turned out the plaintiff went away for a vacation. And between the time she wrote the checks and the time she came back, all hell broke loose on these people who, whose checks had bounced. And indeed this was sort of a hell for the plaintiff.

She was very upset when she came back and learned that. Thought it was her fault. And spent a good deal of time trying to discover the reason this happened. Went to the bank where she had been dealing for some time. And on October the 16th spent approximately seven hours looking for the mistake.

Appendix C

In the time she was at the bank Mr. Dwight Clarke who was, I think he was the manager at the time, I am not sure. In any event Mr. Dwight Clarke was trying to help her discover what the problem was, and apparently through some [180] phone calls learned later in the day what had happened, and told her so. Told her that one of the tellers forgot to put a hole in the check. It was certified.

The bank admitted its mistake, and between that time and the very next day corrected its mistake. And then spent the next few weeks trying to make amends with the plaintiff's recipients of the dishonored checks. And indeed with her help and their lawyer's help, the bank sent out letters to all of its, all of the plaintiff's customers explaining that the mistake was the bank's and had nothing to do with Ms. Bennett. And they apologized for their error.

As a result there was no loss of business that has been claimed in this case through this error. And indeed there is no evidence that the plaintiff suffered any actual damages as a result of the bank's error.

What this case comes down to is the emotional state of Ms. Bennett from October the 16th, when she learned that these checks had bounced, and when she learned the reason that the checks were dishonored.

We know that she went home that day, October the 16th, and she was very, very distraught. Her husband testified to that. Said she was ashen. She cried. She was very distraught. Different than he had ever seen her before. She went into her room. She said cried for two and [181] a half hours. So we

know on that day Ms. Bennett suffered emotional distress, and the Court finds that that was directly related to the dishonoring of checks sent to some of her clients.

I would think that the bank would be responsible for that. They had to have foreseen that something like that might happen. They knew that Ms. Bennett had a large escrow account there, and that would be a reasonable consequence of its mistake.

And we know that for the next month until at least these letters went out by the bank that Ms. Bennett for that month was very worried about her position with her clients. She had trouble sleeping. She sweated profusely. Lost weight. And she was mighty angry. I would think that that too was a consequence of the bank's mistake.

However, on November the 17th when those letters went out, wait a minute. Forget that. That is Exhibit 5.

MR. TRACY: It was November 8, Your Honor.

MS. MILLER: November —

THE COURT: What? What? November.

MS. MILLER: — the 8th.

THE COURT: I am sorry.

MS. MILLER: November the 8th.

Appendix C

THE COURT: November the 8th —

MR. TRACY: November 8, yes.

[182] THE COURT: — when the letters went out, it seemed to me the bank did all that it could have done to rectify the situation. And at that point Ms. Barrett, Bennett, I am sorry, should have gotten over her anger and her problems. So as, although I think she was in hell for a while, I think it is, to use the analogy from Danté, it was the first circle of hell. Not the ninth.

VERDICT OF THE COURT

Accordingly the Court enters judgment in the favor of Ms. Bennett in the following way. For the first day when she found out about this incident, went home and cried for several hours, I will award $500.00. For the first month until November the 8th when the bank letter went out, $2,000.00. For the second month until she could and should have gotten over it, another $500.00, for a total amount of $3,000.00, plus Court costs.

Anything else, gentlemen?

MR. TRACY: No, Your Honor.

THE COURT: Now I want you to take your Exhibits back, and I certainly want you to take all these Exhibits back. I thank you for giving me the depositions, but you all can have these back. Return the Exhibits Madam Clerk, and enter the appropriate judgment.

Appendix C

THE CLERK: Do you want (inaudible).

THE COURT: The case is closed statistically, exactly.

MR. TRACY: May we be excused, Your Honor?.

THE COURT: Indeed.

MR. TRACY: Thank you, Your Honor.

(The proceedings concluded at 3:23 p.m.)

APPENDIX D — REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS (MOTIONS HEARING) DATED MAY 17, 2001 AND FILED AUGUST 2, 2001

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

CIVIL ACTION LAW
No. 98-20583

KIMBERLY LACEWELL BENNETT,

Plaintiff,

vs.

FIRST NATIONAL BANK OF MARYLAND,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT OF
PROCEEDINGS
(MOTIONS HEARING)

Upper Marlboro, Maryland
May 17, 2001

BEFORE: HONORABLE LARNZELL MARTIN, JR.,
Associate Judge

[commencing at p. M-15] That check that came back and hit my bank. In the second order of presentment it paid $104,756. And, there-fore, when the thirty-two checks were presented and thirty-one were uncollected there was a balance of $65,555.08.

Appendix D

Per UCC Rules they should have returned one check and paid thirty checks, with a residual balance of $20,241.01. The bank returned all thirty-two checks from my escrow account.

Their pleadings were done the month that they changed their commercial overdraft system to be compliant with the UCC provisions of the final payment.

Their retail side was already compliant with making UCC paid items irreversible. The commercial side was totally non-compliant.

Therefore, when the Defendant's checks were presented to the bank they said that it caused the checks to bounce because of a double withdrawal from that account.

That is the banks fault. That is obtaining money in the custody of a federally-insured institution by false pretenses, and the overdrafts were returned because of their false pretenses and improper certification. It was the UCC Paid items on [M-16] their commercial overdraft system. Which then the upper echelon of the bank had to give approval for any overturns.

The bank changed that the same month I initiated this, which was almost three years up to the Statue of Limitations. Therefore, when they filed their pleadings they knew that the check did not bounce due to an improperly certified check, it was due to the fact that they had a systematic non-compliance with the law of the UCC. It is in violation of regulations of the UCC — their in-house manual and the rules of UCC. That is what this is about.

Appendix D

In June of 1999 I requested production of documents that discloses duality of the system, the retail versus the commercial. The retail being UCC compliant, non-reversible, must pay items. This was requested June of 1999.

The Court compelled them on October 20 of 2000 to produce the documents. They did not produce them. I had to go back to court on January 10 of 2001, a few months ago, on this very issue.

The Court then ordered them again to produce the documents. They produced them after I spent days of going through the documents, putting [M-17] them back in order. They did partial productions of that.

They revealed that the retail side was compliant and being unreversible. And their understanding of the UCC Rule is that checks are paid based on the total amount of over-drafts submitted for the day, not based on a per-check basis for the UCC.

Further, Section 4-402 states that they can only dishonor checks based on the balance that is in a customer's account. There is an upper echelon, also, that can make decisions to overturn the system.

The bank had a different system for commercial account customers. How long they knew me determined whether they were going to pay the checks, to make the commercial analysis to determine whether they were going to pay my checks.

The determining factor was not how much they had in my account, therefore, they committed bank fraud.

$104,000 was taken out of my account for fourteen days. The sum $65,000 was taken for fourteen days and they bounced thirty-two checks. There is three funds of money that they have not accounted for.

They sent letters from general counsel for the bank, sitting at the table with the Defendant, to [M-18] my clients that had received the checks that the checks bounced based on an improper certification.

Meantime, one of the individuals who participated returned the check as uncollected. Uncollected means the funds are in her account, they are just not cleared. That was violative of UCC's Rules on Financial Transactions.

That individual was fired the month after I initiated this litigation. All of her securities licenses — 6, 7, 24, and 63 — were no longer active. They never became active again and have since expired.

That is all, Your Honor.

THE COURT: One question in reference to the RICO claim in December of '99. When your Counsel, Ms. Ellis — When your counsel sought to withdraw her appearance there was reference to RICO. How long has it been that this claim had been considered as one that would be presented?

Appendix D -

MS. BENNETT: Sir, back in December of 1999 I was going on my emotional condition, my emotional state, of what happened to me, feeling that RICO was applicable in that a bank could bounce thirty-two checks on my escrow account.

At that time I did not realize that they had violated the UCC Code by not paying the checks. I [M-19] did not realize that under final payment their dishonoring a total of $114,000, when I had $65,000 in my account, was RICO, was the bank's fault.

Even Judge Smith said to me the last time that we met, he said, Ms. Bennett, it seems to me that if you think they are hiding something — and they very well may be hiding something — but that is for you and the trier of fact.

Basically, that is the facts. That is what they said. The check bounced because of the improper certification, of an improperly certified check. That is a fact that they don't deny. That is all the facts they are able to prove. And, in the phrase of Walt Garrison, they wouldn't be able to stray off the ranch.

It wasn't until their production of documents that it was shown that they had to implement a duality system for the UCC. Final payment under the UCC retail side was compliant, making UCC paid items irreversible, non-reversible. On the commercial side it was totally different.

Not only that, Your Honor, there was a variety of irregularities with my account. They were attempting to change the type of product that I had originally opened, by the same individuals who [M-20] perpetrated this upon me, as well as removing funds for bounced checks.

Appendix D

For five years they are refusing to put them back, even when I wrote them and said the funds that you have removed in bounced checks fees that you promised to bring back are part of client funds that now I am forced to pay out of my pocket.

So it relates to a variety of irregularities. The UCC states that in good faith the honesty. And, in fact, it is also reasonable commercial standard, a fair deal.

The fact that the checks bounced was based on improper certification. They said that. And it was after they had already changed their commercial system to become compliant once I filed.

So they knew it was based on the fact that they had overturned UCC, and not had the effects of any improper research like that. And general counsel sent letters to my client through the mail stating that these checks bounced based on the effect of an improper certification.

THE COURT: Thank you.

MR.. TRACY: May I respond, Your Honor?

THE COURT: Yes, sir.

MR. TRACY: First, Your Honor referenced [M-21] withdrawal developed the case. And I am not sure where the referral to the RICO claim. Is that in the court file? Because the Plaintiff, for approximately six months, has suggested

and threatened an administrative proceedings against the bank. No such administrative proceeding has been forthcoming.

So it would suggest to me that she has tried to get Ms. Ellis to bring RICO. But, again, she brought this Amended Complaint on the eve of trial. We had no way of knowing she was going to do this.

She would never disclose to me what the basis was of the administrative proceeding because she keeps everything close. She doesn't file papers in opposition, she won't speak with me, and she doesn't correspond on issues related to the case.

THE COURT: Let me just say this.

Paragraph —

I know I am interfering with your inquiry.

MR. TRACY: Yes.

THE COURT: Motion to Withdraw Appearance of Counsel filed December 29, 1999, Paragraph 3: Furthermore, Plaintiff was insistent upon Counsel filing a racketeering claim against Defendant in this matter, which the undersigned believed was inappropriate. On this basis, as well as the [M-22] undersigned section to withdrawn, was December 29, 1999. That is reference to rebuttal.

MR. TRACY: Thank you, Your Honor. I had forgotten that. I am sure I read it at that time, certainly, in Counsel's Motion to Withdraw.

Furthermore, when Counsel, herself, is saying it is not warranted by the facts is certainly not a notice of the claim.

Even if the Court would consider that notice, that is still four years after these events occurred. Four years and two months.

What is important here, Your Honor, listening to the Plaintiff argue, is like trying to avoid scattershot from a gun.

Change of accounts. There was an account that the Plaintiff had, an operating account, not this account at issue. The bank improperly designated it as Commercial 1 or Commercial 2, or something of that nature.

The Plaintiff said that there is a problem here. The bank fixes it back in April or May of 1995, well more than three years before the Complaint was filed. That is not even in issue in this case. It is not even the same count that was ever filed be followed between the parties.

[M-23] Plaintiff refers to accounting for funds. The suggestion here that some funds are missing, and haven't been accounted for, I think is incredibly untrue. And it is incredibly disingenuous. The Plaintiff had $104,000 in debits from her account. It was improperly debited the second time.

When the mistake was discovered the bank put it right back in immediately. No question about it. There are know funds missing, no funds that are unaccounted for.

Appendix D

The Plaintiff suggests that the change of manuals is an admission of how, the bank had knowledge that the systems were noncompliant. The change of manuals is something that took a long period of time. It went from a five-volume manual down to a two-volume manual. It was part of implementing the UCC Rules.

The First Maryland Bank had acquired out of it was state aimed it went with out-of-state banks and they had a new computer system.

Once the Plaintiff filed the Complaint they didn't put it in a new context. The bank never asked any witnesses about any issues. She is simply taking facts that are plotting out there and adding that to her theory. The firing of Amelia Holland. Amelia Holland was fired for a purpose completely [M-24] unrelated to the Plaintiff, or her case.

Ms. Holland had a securities licenses, and so did other people. In the Plaintiff's facts she suggests it is relevant. I don't know why.

Mail fraud. She accuses Nancy Miller of committing mail fraud, of sending letters of apology to her clients. Letters that she wasn't happy with, although it contained the language suggested by the client.

After mail fraud there is bank fraud.

THE COURT: She is accusing the bank of bank fraud?

MR. TRACY: That is what I heard. There is no suggestion of any representation in her statement, or anything to the Plaintiff, that was fraudulent, unreasonable, a misapplication of these facts.

These facts haven't been plead. They haven't been asked about in discovery. They haven't been explored. They should be stricken.

Your Honor, the issue about these dual systems. The Plaintiff somehow suggests that it is — that this is relevant. The Plaintiff herself said, I didn't know about UCC requirements until some years after I filed the Complaint. That is not the bank's [M-25] problem that she didn't know that.

Maybe the bank violated another provision of the UCC. Liability is admitted. It has been admitted. The bank violated 4-402 by wrongfully dishonoring thirty-two checks.

The Plaintiff has now come up with a theory that it shouldn't have returned thirty-one of those thirty-two checks based on a different section of the Code.

Well, Plaintiff alleged 4-402 in her Complaint, not another Section. If there is another section the bank violated, it was incumbent upon her to file that claim within the Statue of Limitations period.

The manual is a red herring. The manual had a retail side, which the Plaintiff asked questions about. I wrote Plaintiff's new counsel a letter and said that doesn't apply to this case. Here is the commercial section of the manual.

Appendix D

Now, the Plaintiff said the manual didn't comply with the UCC. Well, right or wrong, the UCC imposed a duty upon the bank. That duty existed back in 1995, and Plaintiff's claim had to be filed with the UCC provision within three years. The only relevant facts here, which do not establish retail in [M-26] any way, the facts are miscertified checks.

Thirty-two checks were returned. Their amounts, in relation to the balance in Plaintiff's account on October 6, 1995. All of these facts were known to all parties on October 16, 1995. At that point the Statue of Limitations began to run. And there is no other relevant fact that has been produced in discovery that has any bearing on this.

The Plaintiff — Again the Plaintiff's suggestion here about the production of documents, the bank responded to the Request for Production of Documents. We got no letter or phone call saying that these are deficient until she filed a motion a year later.

And the delays are the Plaintiff's fault. Plaintiff filed the Motion. The bank voluntarily produced the required documents.

And then we go to a hearing and the Plaintiff says: I need the full manual. Well, only about ten pages of the manual are relevant to this case, which has already been produced.

The Plaintiff is playing her theories. Judge Smith said, you produce the manual. So we produced it.

Appendix D

We go back to court on January 10. And it [M-27] is held, again, to an absolutely untrue statement.

After the October 20 hearing the judge said, please sign a confidentiality order. We get to respond.

We filed a motion heard by Judge Smith. Our motion to grant this. And we are not responsible.

There is no bad faith going on here by the bank. The bank is following the Rules of Procedure, in attempting, the best it can do to communicate with the Plaintiff and resolve the issued in court. It has not been possible.

But all of this is not relevant. What is relevant is meetings, notice of pleas, and the Statute of Limitations. And there can be no question that the phrase withstands. The Plaintiff had something. She produced the evidence. It is about damages.

The Plaintiff does not have to prove damages. She did not have a right after discovery closed to add ten counts to the case that alleges different types of facts unrelated to what the case is about, and which adds a series of categories of damages that the bank was not defending for two years in this case. And that is what is before the Court is the issue of the Statute of Limitations.

For that reason, Your Honor, the Defendant [M-28] respectfully will request that the (Second) Amended Claim be stricken.

And I have further argument about the Third Amended Claim, which I'll address when Your Honor is ready.

THE COURT: In reference to the Defendant's Motion to Strike the (Second) Amended Complaint, the Court finds that it would be prejudicial to the Defendant to require that the Defendant prepare a defense of the new causes of action set forth in the (Second) Amended Complaint. And that is aside from the Statue of Limitations.

The trial being set for next week, the Court finds it would clearly be prejudicial to the Defendant to allow the Plaintiff's (Second) Amended Complaint to go forward. And the Defendant's Motion to Strike the (Second) Amended Complaint is granted.

Now, anything additional in reference to the Motion to Strike the Amended Complaint?

Mr. Tracy, do you have anything?

The Court has a copy of the hearings transcript, page 60 of the hearing before Judge Smith.

MR. TRACY: Your Honor, are you referring to the Plaintiff's Motion to Strike Bond, the April 24 hearing?

[M-29] THE COURT: You can go ahead and proceed with your argument.

MR. TRACY: Because I have a copy.

THE COURT: I'd like to see it, if I can.

MR. TRACY: This is the Motion to Strike with attachments.

(Whereupon, the documents were passed to the Court.)

THE COURT: Thank you.

You may continue.

MR. TRACY: Thank you, Your Honor.

He made reference —

THE COURT: You made reference in your correspondence to Judge Smith to a page 60 reference to your Motion to Strike the Amended Complaint.

Let me just return this one to you. This is —

MR. TRACY: With that referencing, Judge Smith, —

THE COURT: One second here.

MR. TRACY: Sure.

Actually, I have a copy of that prior hearing.

THE COURT: In your May 1, 2000, letter to the judge it states: See attached a copy of the [M-30] relevant portion of the transcript of the hearing, specifically page 60, for your reference.

MR. TRACY: And Judge Smith denied the motion without prejudice, to be heard by the trial court.

THE COURT: And the first question is —

Well, continue.

MR. TRACY: Well, just to trace the procedural aspect that occurred. The Plaintiff filed this Motion on or about September 6. The Defendant duly filed a Motion to Strike. No Opposition was filed, or has been filed.

On the January 10 hearing, which was a hearing on Defendant's Motion for Confidentiality Order, in the pretrial conference I had raised the issue of the unopposed Motion to Strike. That was the standard.

Judge Smith declined to hear the merits of the motion. He said it was better heard by the trial judge. Which, of course, is indicated on page 60, where he denied the motion without prejudice.

Thereafter, I intended to file a motion with the Court requesting that a hearing be held before trial so that the parties know what the Plaintiff is going to present at trial so they may [M-31] prepare.

The Court scheduled a hearing on May 4. That was before the Court when they scheduled the hearing on May 4.

On May 2 the Plaintiff delivered a letter to Judge Schiff's chambers requesting the matter be continued because of Judge Smith's comments on page 60.

Appendix D

The fact was I didn't have any notice of the request for this hearing. I appeared on May 4 before Judge Lombardi, after Judge Schiff went to the hospital. Judge Lombardi refused to hear the motion in the absence of Judge Schiff.

I sent a letter to Judge Schiff requesting that there be a hearing scheduled. And I also sent a letter to Your Honor with the same.

Now, the issues, the legal issues, are the same on both the First Amended Complaint and the (Second) Amended Complaint.

The First Amended Complaint has one factor on 242 UCC, Section 81. The First Amended Complaint requests a jury trial. The Plaintiff had previously waived that right in the Complaint by not requesting a jury trial.

Now, what is important here is the same [M-32] principal. This is an unopposed motion. It is a Opposition to Motion for Summary Judgment.

I prepared a memo for the Court outlining all of the relevant cases — cases with my cites, cases with the Plaintiff's cites, and some additional cases that allow amendments. And in all of these cases — our cases and the Plaintiff's — support the Defendant's conclusion here that they cannot do that.

The Plaintiff used general ideas about operative facts. What are the operative facts? Who handled the check? Breach of contract with the Defendant. UCC tort. The Plaintiff got the wrong facts. Those are the operative facts.

Appendix D

The Plaintiff said, I am now alleging race discrimination. And it all happened back then when they mishandled the check. So it relates back.

That is not the law in Maryland and shouldn't be the law in Maryland.

What goes back to the pleadings is a very simple standard to meet, which the Plaintiff failed to meet. The standard is Complaints that do not allege or suggest racial discrimination. It doesn't even state that the Plaintiff is a member of a protected class. It doesn't say anything about any facts that anybody at the bank took any action or said anything [M-33] to discriminate against the Plaintiff because of her race.

The Defendant filed Interrogatories, Answers to Interrogatories. And she was making no reference to this claim for racial discrimination. That was in 1999.

On February 2 of 2000, almost a year and a half into this case, over five years since the events occurred, the Plaintiff said under 5-738, asking her questions at length about what happened. Who were these people? Who said what? Why do you think they did this or didn't do this or that?

There were depositions. Not one mention of racial prejudice. Not one suggestion that I was the victim of discrimination. Probably because she liked everybody at the bank except for one person. But she liked everybody. They were all African-Americans. That is what her position was.

Appendix D

We are not defending a civil rights case here, at least for the first two years of it. Suddenly, in the Amended Complaint, there is a racial discrimination claim.

Now, the law, — If Your Honor refers to the cases outlined by the Plaintiff, it is very clear, to relate back the initial pleading, it has to set [M-34] forth facts that give notice of the claim that the claim she is asserting should relate back.

For example, the case that the Plaintiff relies upon is a case where the Plaintiff had sued the Defendant for tortious interference of contract. They alleged the contract — They alleged that the Defendant breached the contract. They alleged that they were damaged as a result of that breach.

Unfortunately, they stated in the initial Complaint this is a tortious interference case, not with the contract or the Statute of Limitations. Period. They state, well, it is a breach of contract case.

The Court said that relates back, that you plead all of the operative facts that are set forth in this cause of action.

In the new Complaint the new cause of action was setting forth all of the operative facts back in the original Complaint. That is the most recent case on the theory of liberal allowance of cause. That is the most liberal case the Plaintiff could find. In that case all the facts were plead in the Complaint.

There can be no dispute that this initial Complaint mentioned nothing about racial [M-35] discrimination, and provides absolutely no notice that the Plaintiff has this claim.

Appendix D

Now, if you review the other cases, the other cases plead by the Defendant and the Plaintiff. The Plaintiff's case, which is cited in support of her position, is Cline versus Fountain-rock Lime and Brick Co.

In that case the court held that the new cause of action based upon the alleged joint venture agreement was a distinct cause of action from that based upon the alleged joint venture agreement was a distinct cause of action, with different elements — with different elements accrued.

In Morrell v. Williams, a wrongful death case, the court held that wrongful deaths filed within the Statue of Limitations — outside the Statute of Limitations, and they used the language, clearly in a wrongful death case mental anguish requires different elements of proof and involves a different measure of damages.

A person may suffer mental anguish. But the Court held a claim for mental anguish is a totally different cause of action and requires different elements of proof, different facts in discovery, and a different measure of discovery which cannot follow [M-36] after the close of discovery in a case.

In Gensler versus Korb Roofers, Inc., Gensler put the roof on. There is a hole in it. Gensler initially filed the case under breach of Warranty within the Statute of Limitations, adding a claim of negligence outside the limitations.

That is not going back. Clearly it is the same set of operative facts, if we are talking about a leaky roof.

But what is crucial is whether or not the elements of the cause of action were plead in the initial pleading. Negligence at different elements of proof and different measures of damages not plead in the initial Complaint does not relate back.

There can be no question in this case the Plaintiff did not plea racial discrimination. We are not even talking about a case plead days before the Statute. That was a rush job. And in discovery she starts raising racial discrimination. We should have known this. We should have known that.

That is not what this case is about. The Plaintiff states in deposition the case was prepared, and she decides to wait until the Statue of Limitations almost ran, and then she filed it. There is no issue for deliberation.

[M-37] And since that occurred, surely the Plaintiff would have raised an issue in the Answers to Interrogatories, or at least in her deposition in this matter. The Defendant has repeatedly asked: What are your damages? So we can make settlement or dispute them you have to state your damages.

But, apparently, the Plaintiff was unable to produce such evidence. She is trying to place this case before a jury to discover damages. And we are back to the same issue as we were on the (Second) Amended Complaint about the Statue of Limitations, about notice.

It is also about prejudice. Because in this case the Amended Complaint was filed after the close of discovery. The Defendant

has not had any opportunity to depose the Plaintiff for challenge of pleadings before Judge Smith, or motions after discovery.

We have had no discovery on these issues. The Plaintiff herself, in the deposition, never asked one question about racial discrimination. And it can't be clearer that there is no legitimate cause of action.

But, regardless, if there was — We are talking about the Statute of Limitations, and the [M-38] cause of action cannot be affected. For that reason there is a whole new cause of action, and the Amended Complaint should be stricken under Rule 2-341.

THE COURT: Mr. Preston?

MR. PRESSMAN: Your Honor, about two and a half weeks ago the Defendant filed a Motion for Partial Summary Judgment. One the issues raised was that the racial discrimination claim should be stricken because it does not relates back.

A second ground in that motion was that there wasn't any evidence in the record to date to raise a genuine issue about racial discrimination.

Your Honor, on May 8 of this year, after directing us to file by fax in chambers a Response to the Motion, denied this Motion. Therefore, Your Honor, approximately ten days ago, has ruled and rejected the argument that Counsel just made about relation back. And, again, the Court addressed

this argument, and the argument that there wasn't racial discrimination, to raise a genuine issue about it.

And the Court might remember that there was a witness who was also a teller at the time that the teller made a mistake by not punching a hole in the check. And this witness said in a deposition, when questioned by Counsel, that this teller she heard [M-39] use the expression "Black bitch" to refer to customers in the bank. And this witness also said in the deposition that she heard the teller, who didn't punch this hole, blurt out one day, "I forgot to punch the hole in the bitch's check."

So there was evidence that we presented in responding to the Motion for Summary Judgment.

And Your Honor necessarily held, although there is not a written opinion, that you rejected the argument that the Complaint could not relate back on a racial discrimination, and that there wasn't any evidence to support that now.

The second issue that Counsel raised in this Motion to Strike the Amended Complaint was to — that Plaintiff had waived the request for jury trial.

Now, Judge Smith, in a hearing which I read, I believe it was January 10, did rule that the request for a jury trial had been waived.

On March 10 Plaintiff filed a Motion asking for reconsideration of that Rule. And that motion made two points.

Appendix D

The first point is that Plaintiff filed, along with the original Complaint, the Civil Non-Domestic Case Information Report. And near the very top, where it said "jury demand" the Plaintiff [M-40] checked "yes." And this Request for Reconsideration that was filed on March 10 pointed out not only Maryland cases, but various federal cases that had held that a similar kind of request for a jury trial and some kind of collateral documentation, was adequate to raise the request for a jury trial.

The response also cited to a Maryland case that held that an Amendment to the Complaint is allowed, and the Amendment allowed that if there is a claim that is triable by a jury, that all the claims can then be tried by a jury.

And that is cited in that March 10 memo. And there has not been a ruling on that Request for Reconsideration.

So that was the second issue that Counsel raised in moving to strike the (Second) Amended Complaint.

The third issue that Counsel raised was that the Amended Complaint that was filed in December of 2000 asked for punitive damages. And counsel said that punitive damages has not been requested in the two claims that remain from the original Complaint. It is correct that three claims from the original Complaint were stricken after a Motion to Produce.

Now, in the original Complaint there was [M-41] first stated one claim that asked for punitive damages. And then

at the beginning of the wrongful dishonor claim it said that, as sometimes happens, it said that Paragraphs 1 through 31 are repeated.

Now, if you go back to what was incorporated there, there was an allegation that the teller, and what was repeated from the first part: There was an allegation that the teller who didn't punch of the hole had personal animosity towards the Plaintiff. There was an allegation that the bank knew for a number of days after the hole wasn't punched about that problem, but didn't act to correct the situation for approximately two weeks.

And there was also an allegation that after Plaintiff came back from a vacation she came to the bank because she received phone calls saying, your checks are bouncing.

She went to the bank to try to find the problem. And, of course, we had alleged that the bank knew of the problem, but she was ushered into a room where she worked five or six hours before being told just before she had to leave the bank, well, the problem is because a hole wasn't punched.

So there was in the original Complaint, by incorporating the allegations in the first part, facts [M-42] from which you could find the state of mind that the Maryland Court of Appeals requires for punitive damages: Namely, you can't get punitive damages based on some concept of recklessness, but there has to be actual knowledge of wrongdoing.

Here there was an allegation of personal animosity of the person that didn't punch the hole. That the bank knew of

the problem for a couple of weeks, but didn't act to correct it. And that a person allows Plaintiff to suffer in this room for five or six hours, although the bank knew the problem.

Now, it is correct that in the Prayer for Relief in the wrongful dishonor part of the Complaint it just asks for $200,000 in gross for damages. It does not say whether that was compensatory or punitive damages. And, in my understanding, that would not be an adequate request under current Maryland law to ask for punitive damages.

Now, Counsel is basically saying that when someone files an Amended complaint, and adds an element of relief, which is what punitive damages is, that is appropriate in many types of claims if there is the requisite knowledge. That is such a departure from the original Complaint that somehow that allegation can be stricken.

[M-43] That simply isn't correct. And if one looks at the Rule in Maryland on Amendments 2-341(a), all that it says is:

Prior to fifteen days of trial date. If an amendment introduces new facts or varies the case in a material respect, an adverse party who wishes to contest new facts or allegations shall file a new or additional answer to the amendment within the time remaining to answer the original pleading.

If filing a new form of relief is varying the case in a material effect, all it says is the Defendant should file a new Answer.

Appendix D

Then, down in part C, going to Amendment, it says: An amendment may seek to (1) change the nature of the action or defense, (2), set forth a better statement of facts concerning any matter already raised in a pleading, (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended.

Well, if just adding an element of relief is changing it in the midst of the action, that contemplates that kind of change.

So these are the three specific areas in which Counsel tried to base the Motion to Strike the Amended Complaint. One of them, as we point out, Your [M-44] Honor, was just ruled on ten days ago and rejected the contentions he just made.

I also want to point out that after the Amended Complaint was filed in the beginning of December of the year 2000, it was at the beginning of 2001 when the depositions in this case were taken.

In other words, the depositions, they began approximately a month, and then were — it is in the next month or so after the time of the Amended Complaint.

Counsel had the opportunity at that time to deal with the facts that we are relying upon in our claims of punitive damages, with the exception of the difference between the bank's written standards that address how overdrafts, or possible overdrafts, are handled, and then how the accounts are addressed. And the differences are between retail accounts and a commercial account, like the Plaintiff has.

Appendix D

And here is a simple example.

If someone had an account that had $5,000 in it, and it is a retail account, and one check comes in for $2,000 — I am sorry, $10,000,000 — which is above that $5,000, and a second check comes in for $3,000, the rules for retail accounts say you send back — in other words you do not honor — the check [M-45] for $10,000, but you pay the check for $3,000. The Rules — And both sets of Rules were adopted in 1994.

The rules for commercial accounts didn't have that common sense principal. And it is also one which we say is found in Section 4-402 of the UCC, which is the section about wrongful dishonor. That principal was not in the rules about commercial accounts.

And the people at the bank who, on this day when these thirty-one checks came in, considered what to do under the rules for commercial accounts, they could return all the checks, even though thirty of them could have been paid if one was returned. So, —

And this is in the bank's own rules from 1994. So it is hard to see how the bank is prejudiced from our relying on that.

So, basically, there isn't any merit in the contentions in the Complaint, and the contentions in the Amended Complaint should be stricken.

MR. TRACY: Your Honor, if I may, once again, —

THE COURT: Just one second. We will break.

Mr. Sheriff, when we complete argument we [M-46] will bring Mr. Cromer in, because we do have a verdict.

MR. TRACY: Your Honor, presentation by Plaintiff's Counsel, focusing on the manual provisions, has already indicated the manual developed by the UCC imposes something by law back in 1995. It moves back to relevance, move back et cetera, et cetera.

The whole argument is relevant because the Plaintiff is now attempting to confuse the (Second) Amended Complaint with the First Amended Complaint.

The First Amended Complaint adds one cause of action only. That is the racial discrimination court only. It doesn't impose UCC systems logic and the logic of what gets returned or paid.

We have already admitted liability to all checks. It is a non-issue. But that Amended Complaint solely adds a cause of action.

Now, 2-341 states, specifically, that if different operative facts are plead the Complaint should be stricken. 2-341 says the Complaint should be stricken, the cause of action itself, one new cause of action. There is no dispute, and there can be no dispute, that this claim is barred by the Statue of Limitations.

Appendix D

[M-47] I have been through the facts as we have developed the facts. There is no reference to this claim. It is five years after it has been incurred as viable.

That course of action cannot come to trial under the Statue of Limitations, and the Plaintiff did not file it within the Statue of Limitations.

That was the only substantive change in the allegation in the Complaint to be made.

Now, on the issue of damages, the Plaintiff seems comfortable that the initial Complaint, even though three of the five accounts were dismissed, they still have pending claims. I disagree. But that is a question of interpreting the facts.

The Defendant will defend itself in that Complaint under 4-222. The Defendant will defend itself under the Complaint.

And the Defendant, five years after the event, only makes one substantial claim, adding racial discrimination. All of this is outlined in the Motion to Strike. And the supplement demonstrates that in no way can that cause of action come back.

The Plaintiff's reference to the manual and to the Rules and to the UCC provisions, liability [M-48] under which has been admitted on numerous occasions, is irrelevant.

The suggestion that Your Honor has already ruled on this I think is also disingenuous. This Motion was filed in

September. Technically, it is a Motion to Strike the Plaintiff's Motion, which was heard before the Motion for Summary Judgment.

Motions for Summary Judgment were filed just a couple of weeks before trial because of the way this case has proceeded, denied without hearing, without a written opinion. There is no reason why Your Honor denied that motion without having the Defendant address the issues of relation back. The issues of relation back are clear issues here.

As far as evidence of what the Plaintiff's Counsel has suggested, there was deposition testimony from one teller who had heard the words "black bitch."

It was not addressed to the Plaintiff. The teller herself said we got along. She is in the arrases. And she has muttered things under her breath about other customers who have caused her aggravation.

It is a normal reaction. And it may not be appropriate, but she is human. And that she said something that is inappropriate doesn't mean that the Plaintiff, especially when it is not directed to the [M-49] Plaintiff, is not a prima facie case.

But, regardless of one statement, that is it. And that is a statement that the Plaintiff didn't even elicit. I elicited it.

I made sure I got every fact from the Plaintiff. And she told me everything she knew, and everything she possibly could have heard. And that is it. But that is all irrelevant.

Appendix D

If the Plaintiff was a victim of racial discrimination all she had to do was bring that.

Even if the failure to aver was absolutely inadvertent, this was not inadvertent. It was never suggested that this was an allegation in the two years after filing, after her deposition, after Answers to Interrogatories. And now she is making the claim, Your Honor.

That is not how it is to be applied. The Defendant should not be forced to defend against claims that they have not had an opportunity to investigate under pretrial procedure. And it is absolutely barred by the Statute of Limitations.

In reference to this other motion. It is the ruling on this case for the Motion for Summary Judgment.

Also, in response to cases that may appear [M-50] upon examination close, the result is to let it go to trial.

You can never be reversed if you go ahead and let the case go to trial. You can be reversed on Summary Judgment, but the trial judge has a better instinct in close instances to let the matter go to trial.

And the denial of the Motion for Summary Judgment is a denial of a Motion for Partial Summary Judgment, particularly where there is simply an order signed saying that the action does not inform as much as one might want it to inform.

Appendix D

The Motion to Strike, it is — before it got considered — by the fact that we had the case on that Motion for Partial Summary Judgment. And we were told to consider the Motion to Strike, even though it was not our chambers assignment responsibility.

THE COURT: The Court finds that there is no allegation in the Complaint, the original Complaint, that can be construed as giving notice to the Defendant of any claim related to the provision of Section 1981, and they do not relate back.

So the Motion to Strike the Amended Complaint is granted.

MR. TRACY: Thank you, Your Honor.

APPENDIX E — STATUTES INVOLVED

18 U.S.C.A. §§ 1344(1) & (2)

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice —

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C.A. § 656

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, or a receiver of a national bank, insured bank, branch, agency, or

organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization, or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3 of the Federal Deposit Insurance Act.

Appendix E

18 U.S.C.A. § 1005

§ 1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act,[1] without authority from the directors of such bank, branch, agency, or organization or company, issues or puts in circulation any notes of such bank, branch, agency, or organization or company; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any

---

1. So in original.

agent or examiner appointed to examine the affairs of such bank, company, branch, agency, or organization, or the Board of Governors of the Federal Reserve System;[2]

Whoever with intent to defraud the United States or any agency thereof, or any financial institution referred to in this section, participates or shares in or receives (directly or indirectly) any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such financial institution—

Shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3(w)(1) of the Federal Deposit Insurance Act.

---

2. So in original. Probably should be followed by "or".

Supreme Court U.S.
FILED
JAN 13 2003
OFFICE OF THE CLERK

No. 02-892

IN THE

Supreme Court of the United States

KIMBERLY LACEWELL BENNETT,

Petitioner,

v.

ALLFIRST BANK, formerly known as
THE FIRST NATIONAL BANK OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION

JAMES M. GREENAN
Counsel of Record
KEVIN M. TRACY
MCNAMEE, HOSEA, JERNIGAN, KIM,
GREENAN & WALKER, P.A.
6411 Ivy Lane, Suite 200
Greenbelt, MD 20770
(301) 441-2420

Attorneys for Respondent

178397

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Allfirst Bank, formerly known as The First National Bank of Maryland, is wholly owned by Allied Irish Banks, P.L.C.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	v
Introduction	1
a. Response to Petitioner's Statement of the Case	1
b. Brief Overview of Case	1
c. Jurisdiction	3
d. Rule 15.2 List of Misstatements of Facts and Law	3
e. Issue on Appeal	11
Reasons for Denying the Petition	11
I. The Trial Court Did Not Abuse Its Discretion in Striking the Second Amended Complaint.	11
A. Standard of Review	11
B. Response to Petitioner's Argument	12
i. Rule 2-341 Analysis	12
a. RICO Generally.	12

Contents

Page

b. The RICO claims were properly stricken under Rule 2-341. 13

c. The Second Amended Complaint would not survive a motion to dismiss. 14

d. Count IV of the Second Amended Complaint, for breach of the covenants of good faith and fair dealing, essentially restates Count III of the Complaint for breach of contract. 15

e. Counts VIII and IX of the Second Amended Complaint allege causes of action pursuant to the state and federal consumer protection acts respectively, again adding new legal theories and presumably new factual bases for the claims. 16

f. Count XI (there is no Count X in the Second Amended Complaint) is for "Breach of General Duty of Care" which presumably is a cause of action for negligence. The Petitioner had a cause of action for negligence set forth in the Complaint and it was dismissed by the Trial Court. 17

Contents

Page

g. Counts XII and XIII are for breach of fiduciary duties, which like the previous causes of action, add new legal theories and factual bases for recovery, and will not survive a dispositive motion. 17

h. Conclusion. 18

ii. Statute of Limitations Analysis 20

iii. UCC Issues Raised in the Petition 21

iv. Discovery Issues Raised by the Petitioner 23

a. The Petitioner's Assertion is Factually Incorrect. 23

b. The Petitioner's Assertion is Illogical. 24

v. The Petitioner would be barred by res judicata from seeking punitive damages and by collateral estoppel from pursuing the new claims set forth in the amended complaints in a new trial. 25

Conclusion 28

Appendix — Motion To Withdraw Appearance Of Counsel 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Alvey v. Alvey, 225 Md. 386, 171 A.2d 92 (1961) 27

Atkinson v. Anadarko Bank and Trust Co., 808 F.2d 438 (5th Cir. 1987), *cert. den'd*, 483 U.S. 1032, 107 S. Ct. 3276, 97 L. Ed. 2d 780 14-15

Beck v. Beck, 112 Md. App. 197, 684 A.2d 878 (1996) 24

Berry v. Department of Human Resources, 88 Md. App. 461, 594 A.2d 1258 (1990) 18, 19

Chaires v. Chevy Chase Bank, F.S.B., 131 Md.App. 64, 748 A.2d 34 (2000) 27

Charles River Data Systems, Inc. v. Oracle Complex Systems Corp., 788 F. Supp. 54 (D. Mass. 1991) 15

Cline v. Fountainrock Lime & Brick Co., 214 Md. 251, 134 A.2d 304 (1957) 20

Colandrea v. Wilde Lake Community Ass'n, Inc., 361 Md. 371, 761 A.2d 899 (2000) 27

Collective Federal Sav. v. Creel, 746 F. Supp. 1307 (M.D. La. 1990) 15

Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984) 20

Cited Authorities

Page

Eastern Pub. and Advertising Inc. v. Chesapeake Pub. and Advertising, Inc., 895 F.2d 971 (4th Cir. 1990), *cert. den'd*, 497 U.S. 1025, 110 S. Ct. 3274, 111 L. Ed. 2d 784, *cert. den'd*, 498 U.S. 819, 111 S. Ct. 65, 112 L. Ed. 2d 39 14

Fisher v. State, 128 Md. App. 79, 736 A.2d 1125 (1999) 24

Gensler v. Korb Roofers, Inc., 37 Md. App. 538, 378 A.2d 180 (1977) 20

H.G. Gallimore, Inc. v. Abdula, 652 F. Supp. 437 (N.D. Ill. 1987) 15

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) 13, 20-21

In re Burzynski, 989 F.2d 733 (5th Cir. 1993) 14

Kendall Yacht Corp. v. United California Bank, 50 Cal.App.3d 949, 123 Cal. Rptr. 848, 17 UCC Rep. Service 1270 (1975) 26

Kirschner v. Cable/Tel Corp., 576 F. Supp. 234 (E.D. Penn. 1983) 20

Laro, Inc. v. Chase Manhattan Bank, 866 F. Supp. 132 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 810 15

Manion v. Freund, 967 F.2d 1183 (8th Cir. 1992), *rehearing den'd.* 14

Cited Authorities

Page

Mattvidi Assocs. Lim'd Partnership v. Nationsbank, N.A., 100 Md. App. 71, 639 A.2d 228 (1994) ... 12

McDonald v. Schencker, 18 F.3d 491 (7th Cir. 1994) 14

Mery v. Universal Sav. Ass'n, 737 F. Supp. 1000 (S.D. Tex. 1990) 15

Morrell v. Williams, 279 Md. 497, 366 A.2d 1040 (1976) 20

Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130 (4th Cir. 1993), *cert. den'd*, 510 U.S. 1197, 114 S. Ct. 1307, 127 L. Ed. 2d 658 ..... 13, 21

North River Ins. Comp. v. Baltimore, 343 Md. 34, 680 A.2d 480 (1996) 24

Perlmutter v. Minskoff, 196 Md. 99, 75 A.2d 129 (1950) 12

Prochaska & Associates, Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc., 798 F. Supp. 1427 (D. Neb. 1992) 15

Residential Realty Corp. v. Bancroft Homes Greenspring Valley, Inc., 126 Md. App. 294, 728 A.2d 783 (1999) 11-12

Schultz v. Rhode Island Hosp. Trust Nat. Bank, 94 F.3d 721 (1st Cir. 1996) 14

Cited Authorities

Page

Siegman v. Equitable Trust Co., 267 Md. 309, 297 A.2d 758 (1972) 26

State Farm Fire and Casualty Co. v. Estate of Caton, 540 F. Supp. 673 (N.D. Ind. 1982) 20

Tretick v. Layman, 95 Md. App. 62, 619 A.2d 201 (1993) 24

United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. den'd*, 420 U.S. 925, 95 S. Ct. 1121, 43 L. Ed. 2d 395 12

Walls v. Bank of Glen Burnie, 135 Md. App. 229, 762 A.2d 151 (2000) 26

Witt v. South Carolina Nat. Bank, 613 F. Supp. 140 (D.C.S.C. 1985) 15

Zahra v. Charles, 639 F. Supp 1405 (E.D. Mich. 1986) 15

Statutes:

18 U.S.C. § 1961 13

28 U.S.C. § 1257 3

Maryland Code Annotated, Commercial Law Article, section 4-402 .....1, 12, 26, 27

Rule:

Maryland Rules of Civil Procedure 2-341 ...3, 12, 13, 16

INTRODUCTION

The Petitioner appeals the final judgment entered in her favor after a civil trial before the Circuit Court of Maryland for Prince George's County ("Trial Court"), Judge James J. Lombardi presiding. The trial took place on May 21, 2001. The Petition for Writ of Certiorari ("Petition") contends that the Trial Court erred in striking the Second Amended Complaint, and that the Maryland Court of Special Appeals erred in affirming the Trial Court's judgment. The Maryland Court of Appeals denied the Petitioner's Petition for Writ of Certiorari.

a. Response to Petitioner's Statement of the Case

The Petitioner sets forth a lengthy statement of the case. Unfortunately, the statement is confusing, disjointed, incomplete and misleading. It is important to note that the Petitioner fails to cite pleadings, briefs, hearing transcripts or other evidence to support her allegations and conclusions.

b. Brief Overview of Case

The Petitioner (Plaintiff in the Trial Court), Kimberly Lacewell Bennett ("Bennett"), sued the Respondent, Allfirst Bank, formerly known as The First National Bank of Maryland ("Allfirst"), due to Allfirst's mishandling of a certified check in October of 1995. Allfirst's mistake caused a series of checks written on the Petitioner's commercial escrow account to be dishonored. After the mistake was discovered, Allfirst took all action within its power and all action requested by the Petitioner to rectify the situation. Allfirst paid all of the returned checks; agreed to pay all associated bank fees; and sent letters to all effected parties explaining that the mistake was Allfirst's and not the Petitioner's.

On September 30, 1998, the Petitioner filed the Complaint in the Trial Court alleging causes of action for negligence, wrongful dishonor pursuant to the Maryland Code Annotated, Commercial Law Article, section 4-402 ("UCC 4-402"), breach

of contract, negligent breach of contract, and defamation. The causes of action for negligence, negligent breach of contract and defamation sought punitive damages. Upon motion by Allfirst, the Trial Court dismissed the three causes of action seeking punitive damages.

At the close of the discovery period that was extended on two occasions at the Petitioner's request, and over five years after the relevant events occurred, the Petitioner filed the Amended Complaint, and a little over one month before trial, filed the Second Amended Complaint. The Second Amended Complaint added numerous causes of action and substantially changed the nature of the litigation. Upon motion by Allfirst, the Trial Court struck both amended complaints. The remaining causes of action for breach of contract and wrongful dishonor pending in the Complaint were tried before the Trial Court on May 21, 2001.

Allfirst has admitted its mistake since October of 1995. The only issue to be determined at trial was the extent of damages, if any, suffered by the Petitioner. After a trial on the merits, the Trial Court found that the Petitioner did not suffer any direct damages and awarded consequential damages for emotional harm in the amount of $3,000. The Trial Court also found that Allfirst's mistake was unintentional and that no representative of Allfirst knew of the mistake until the Petitioner appeared in the bank to research her account and determine the nature of the problem. The Trial Court found that Allfirst took all action within its power to rectify the situation.

The Petitioner did not challenge the Trial Court's findings before the Court of Special Appeals and does not challenge them now. Curiously, the Petitioner asks this Court to reconsider the decision of the Trial Court to strike the Second Amended Complaint, and the Court of Special Appeals' affirmance of that decision, but she did not attach any of the relevant documents to her Petition.

c. Jurisdiction

The Petitioner asserts that the Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. § 1257. That statement is inaccurate. As difficult as it is to discern precisely what the Petitioner is complaining about, it is clear that the Petition does not challenge the validity of any federal statute. The Petition does not challenge any court's interpretation of the United States Constitution or any federal statute. As best as can be determined from the Petition, it seems that the Petitioner claims that the Trial Court violated Rule 2-341 of the Maryland Rules of Civil Procedure in striking the Second Amended Complaint and that there may have been discovery abuses. Although both of these points are vigorously disputed, it is clear that neither issue gives rise to jurisdiction in the Supreme Court of the United States under 28 U.S.C. § 1257.

d. Rule 15.2 List of Misstatements of Facts and Law

The Respondent maintains that most if not all of the assertions in the Petition are incorrect and are unsupported by any citations to the record. The Petition states many conclusions of fact and law that were not litigated in the courts below. For that reason, it is extremely difficult to point out all of the misstatements. This section, however, attempts to illuminate the more glaring and blatant misstatements in the Petition.

- On Page 1 of the Petition, the Petitioner states that Allfirst "deceptively dishonored 32 attorney escrow checks. . . ." The trial court explicitly found that there was no deceptive behavior on behalf of any Allfirst representative.

- On Page 1 of the Petition, the Petitioner states that the dishonoring of the checks was "accomplished by known violation of federal law of reversing 'UCC Paid items'. . . ." There was no evidence of any "known" violation of federal

law and the Trial Court explicitly found that no Allfirst representative knew of the mistake until it was discovered on October 16, 1995, when the Petitioner appeared in the Allfirst branch to determine the nature of the problem with her account.

- On Page 1 of the Petition, the Petitioner states that federally insured funds were removed from the Petitioner's account for 14 days. There is no evidence or finding as to whether the funds were federally insured, and the total amount of the dishonored checks was returned the Petitioner's account immediately, not 14 days later.

- On Page 2 of the Petition, the Petitioner states that there was a balance remaining that was sufficient by "federal law" to pay 31 of the 32 dishonored checks. There was never any evidence, finding, discussion or argument regarding this point. Although it is difficult to discern the Petitioner's argument, it appears that she is arguing that the dishonoring of the checks violated the UCC, not federal law. Allfirst, of course, has always admitted that it wrongfully dishonored the checks pursuant to Section 4-402 of the UCC.

- On Page 2 of the Petition, the Petitioner states that there were two systems of final payment of checks. The Petitioner never offered any evidence at trial relating to this purported dual system. The Petitioner also never offered any evidence at trial relating to her assertion that bank officers were permitted to reverse UCC paid items.

- On Page 2 of the Petition, the Petitioner's statement that she received the banking manuals

belatedly is inaccurate. Allfirst had long before produced the relevant portions of the manual. Allfirst produced its entire five volume 1995 manual and its entire two volume 1998 manual after the Court granted its motion for a confidentiality order to which the Petitioner had refused to agree. The delay caused by the Petitioner was approximately two months. The Petitioner's recount of the discovery hearings is likewise inaccurate, but she fails to attach any relevant transcripts to the Petition.

- On Page 3 of the Petition, the Petitioner states that she received 5,500 pages of "disorganized manual provisions." To the contrary, the manual provisions were produced in the exact order that the pages appear in the manual and they were professionally copied.

- On Page 3, the Petitioner refers to reversal of UCC Paid items, but this concept was never litigated. There was no evidence presented on the issue and there are no court rulings relating to reversal of UCC Paid items. There likewise was no evidence or finding that security licensed branch officials were permitted to reverse items "federally mandated for payment in a deliberate and consistent course of conduct." These statements are simply examples of unsupported conclusions relied upon by the Plaintiff.

- On Page 7 of the Petition, the Petitioner states that the retail overdraft system gave security licensed officers the ability to violate federal law. That paragraph is not part of the deposition quote as it appears to be in the Petition. There was no evidence offered at trial relating to this conclusion and there is no court ruling to support the conclusion stated by the Petitioner.

- On Pages 9 and 10 (paragraphs 39-50) of the Petition, the Petitioner quotes the Second Amended Complaint. Allfirst disputes the conclusions set forth in the Second Amended Complaint and maintains that the Second Amended Complaint would not have survived a motion to dismiss, let alone the motion to strike as provided for by Rule 2-341 of the Maryland Rules of Civil Procedure. No evidence or rulings in the record relate in any manner to these issues.

- On Page 10 of the Petition, the Petitioner states that Allfirst's General Counsel, Nancy Miller, endorsed and caused to be mailed letters espousing false pretenses. The letters referenced were letters requested by the Petitioner apologizing to the Petitioner's customers for Allfirst's mistake. The letters contained explicit language demanded by the Petitioner. That is an admitted and undisputed fact. The statement in the Petition is simply a veiled attempt to plead a predicate act under RICO.

- On Page 11 and 12 of the Petition, the Petitioner purports to quote documents, but the source and accuracy of the quote cannot be determined as the documents are not made a part of the Petition.

- On Page 13 of the Petition, the Petitioner states that a review of the escrow account "reveals some egregious final clearing practices." The concept of "final clearing practices" was never an issue in this litigation. It was never a subject of discovery. No evidence was offered at trial relating to final clearing practices and there are no rulings of law in the record relating in any manner to Allfirst's final clearing practices.

- On Page 16 of the Petition, the Petitioner refers to alleged discovery abuses. There were no discovery abuses by Allfirst as it fully complied with its discovery obligations and fully complied with all orders of the Trial Court. As set forth below in this Brief, the Petitioner did not comply with her discovery obligations. It is not a coincidence that both the Maryland Court of Appeals and the Maryland Court of Special Appeals remained "fully and completely silent on the discovery" issues as indicated in the Petition.

- On Page 17 of the Petition, the Petitioner states that Judge Smith "stated that he would personally resolve the Motion to Strike the Second Amended Complaint." Judge Smith made no such statement and there is no transcript in the record to support the allegation.

- On Page 18 of the Petition, the Petitioner states that Judge Smith learned the true reason for the dishonoring of the checks. The meaning of that statement is unclear as the Trial Court made explicit findings as to why the checks were dishonored. There is no reference to any statement and no transcript is cited to support the statement in the Petition.

- On Page 19 of the Petition, the Petitioner states that Allfirst was required to keep teller settlement records. The concept of a "teller settlement record" was never litigated and the mere existence of such a record was never even established by the Plaintiff. Allfirst produced all records relating to the account at issue despite the Petitioner's protests to the contrary.

- On Page 19 of the Petition, the Petitioner states the conclusion that Allfirst used a "false pretense . . . to legitimize" the dishonoring of the checks. To the contrary, Allfirst has always admitted that it wrongfully dishonored the checks and the Trial Court made explicit findings that Allfirst did not engage in any intentional, dishonest or fraudulent conduct. The Petitioner, to her detriment, never produced any evidence of having actually suffered any direct damages as a result of the wrongful dishonors.

- On Page 20 of the Petition, the Petitioner states that the Trial Court was "quite confused" about the improperly certified check. To the contrary, the Trial Court found, as had always been admitted by Allfirst, that the checks were wrongfully dishonored. The Petitioner never presented any evidence at trial to support her position that the checks were wrongfully dishonored for any reason other than that found by the Trial Court. Of course, the Petitioner provides no basis for her assertion.

- On Page 20 of the Petition, the Petitioner states that the Trial Court did not continue this action in order to allow her to proceed on the Second Amended Complaint. The Petitioner never requested a continuance.

- On Page 21 of the Petition, the Petitioner states that "the remedial measure shows that with federal compliance, 31 checks would have been paid irrespective of the results of an improperly certified check used as a guise to take property from a federally insured institution by false pretenses." This statement is conclusion that is

unsupported by reference to any facts or rulings of law in the record. The issue was never litigated below.

- On Page 22 of the Petition, the Petitioner states that the Respondent "continues to contend that in 1995, $65,555.08 was 'insufficient' to pay 31 checks totaling $41,609.57." That statement is completely false. The Respondent has never made a contention one way or another as to whether $65,555.08 is greater than $41,609.57. Rather, since the relevant events occurred, Allfirst has admitted that it wrongfully dishonored all of the checks. The Petitioner never produced any evidence of direct damages as a result of the wrongful dishonors and the Petitioner never produced any evidence that the mistake somehow occurred as a result of intentional or fraudulent conduct.

- On Page 22 of the Petition, the Petitioner refers to "Corporate Corruption." There was never any evidence presented at trial relating in any manner to "Corporate Corruption." As quoted in the Petition itself, the Trial Court found no evidence of any deceptive behavior, intentional wrongdoing or any kind of fraudulent conduct.

- On Page 22 of the Petition, the Petitioner refers to "admitted violations by bank officers of a system of reversing UCC Paid items." The Petitioner provides absolutely no basis for the assertion. There were no admitted violations of federal law. Rather, as set forth above, Allfirst has always admitted that it mistakenly and wrongfully dishonored checks pursuant to Section 4-402 of the UCC. The Petitioner apparently now claims that Allfirst violated the

National Bank Act, yet she fails to illuminate exactly what provision Allfirst violated and how it violated the act. The Petitioner does not allege that the National Banking Act is invalid in any manner or that any Maryland court misinterpreted the act.

- On Page 25 of the Petition, the Petitioner references John Rusnik, a former employee of Allfirst whose gross negligence was a news story. The circumstances surrounding Mr. Rusnik were never an issue in this case and reference to him is irrelevant and inappropriate.

- On Page 29 of the Petition, the Petitioner states that by accepting Allfirst's admission of liability in striking the Second Amended Complaint, the Petitioner was foreclosed from being able to present the deceptive nature of the dishonors. That statement is completely inaccurate. The Trial Court's striking of the Second Amended Complaint was not an acceptance of Allfirst's admission of liability. More importantly, Section 4-402 of the UCC for Wrongful Dishonor allows a Plaintiff to recover punitive damages. The Petitioner did not present any evidence of any deceptive, intentional or fraudulent behavior at trial. The Trial Court made explicit findings that Allfirst did not engage in any deceptive, intentional or fraudulent conduct. The Plaintiff had an opportunity to recover exemplary damages under the causes of action that went to trial, but she failed to meet her burden.

e. Issue on Appeal

In the Petition, the Petitioner frames the "question presented" for appeal as follows:

> The question presented is whether based upon the fraudulent concealment doctrine, did the trial court and Court of Special Appeals err in striking the RICO cause of action, where Allfirst Bank deceptively dishonored thirty-two attorney escrow checks utilizing a system of final payment which knowingly violated federal law (reversal of UCC Paid Items and the aggregating of overdrafts) and not due to the lawful effects of an improperly certified check as pleaded and as discovered in the bank's internal manual and deposition testimony of participating officers of the bank on overdraft duties.

Petition, pg. i.

REASONS FOR DENYING THE PETITION

I. The Trial Court Did Not Abuse Its Discretion in Striking the Second Amended Complaint.

A. Standard of Review

The issues relating to the striking of the amended complaints were fully briefed in the Trial Court. As demonstrated in the transcript of the hearing before Judge Lamzell Martin, Jr., on May 17, 2001, and in the underlying briefs, there was lengthy argument on the issues and Judge Martin made a reasoned and fully informed decision.

As the relevant case law makes clear, trial judges have substantial discretion to allow or deny the amendment of pleadings. The exercise of discretion by the trial judge will not be overturned unless the trial judge abuses his or her discretion. *Residential Realty Corp. v. Bancroft Homes Greenspring Valley,*

Inc., 126 Md. App. 294, 728 A.2d 783 (1999); *Mattvidi Assocs. Lim'd Partnership v. Nationsbank, N.A.*, 100 Md. App. 71, 639 A.2d 228 (1994); *Perlmutter v. Minskoff*, 196 Md. 99, 75 A.2d 129 (1950) (stating the relevant standard is abuse of discretion).

B. Response to Petitioner's Argument

The Petitioner's argument as to why the Trial Court erred in striking the Second Amended Complaint is unclear. The Petition references only one of the ten new causes of action pled in the Second Amended Complaint, and that reference is vague at best. Judge Martin struck the Second Amended Complaint based on Rule 2-341 of the Maryland Rules of Civil Procedure as he found that prejudice would be imposed on Allfirst if it was forced to defend the Second Amended Complaint. Judge Martin did not address the statute of limitations issues raised. The Court of Special Appeals, however, ruled that the Second Amended Complaint was barred by the statute of limitations.

i. Rule 2-341 Analysis

The Second Amended Complaint added ten new causes of action to the litigation approximately 1 ½ months before trial and approximately 5 ½ years after the relevant events occurred. The new causes of action purported to change the nature of the litigation significantly. The paramount change from the Complaint to the Second Amended Complaint was the addition of RICO claims and other causes of action based on intentional misconduct. Only breach of contract and the UCC 4-402 claim were previously pending. The following is a paraphrasing of the briefs filed in the Trial Court in support of Allfirst's Motion to Strike the Second Amended Complaint.

a. RICO Generally.

The RICO statute was intended to eradicate organized crime. *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. den'd*, 420 U.S. 925, 95 S. Ct. 1121, 43 L. Ed. 2d 395.

RICO liability is based upon criminal enterprises and a pattern of racketeering activity. To prove a pattern of racketeering activity under RICO, the Petitioner must prove that Allfirst committed at least two predicate racketeering acts, that the predicate acts are related, and that the racketeering activity amounts to or poses a threat of continued criminal activity. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989); *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130 (4th Cir. 1993), *cert. den'd*, 510 U.S. 1197, 114 S. Ct. 1307, 127 L. Ed. 2d 658. Racketeering activity, among other things, includes threats of murder, kidnapping, gambling, arson, robbery, bribery, extortion, drug trafficking, bribery, counterfeiting, theft, embezzlement, extortionate credit transactions, mail fraud, and obstruction of justice or criminal investigations. 18 U.S.C. § 1961 (1984).

b. The RICO claims were properly stricken under Rule 2-341.

The RICO claims attempted to introduce into this case a completely new legal theory of recovery and a new fact pattern that had not been explored in discovery. Furthermore, the nature of the Petitioner's RICO claims are not discernible from the Second Amended Complaint. It would have been incredibly prejudicial to Allfirst to force it to defend the RICO claims without having had an opportunity to challenge the pleading of those claims, to explore the nature of the claims in discovery, and to file an appropriate dispositive motion. Allfirst would have been completely unable to prepare for trial adequately.

Rule 2-341 provides a procedure to strike amended complaints precisely to avoid this type of situation. The Petitioner was attempting to engage in trial by ambush by changing the nature of the case on the eve of trial after the close of the twice extended discovery period.

c. The Second Amended Complaint would not survive a motion to dismiss.

Without fully briefing the pleading deficiencies of the Second Amended Complaint, a cursory review demonstrates that it would not survive a motion to dismiss.

First, to plead elements sounding in fraud as the Plaintiff's RICO claims do, the Petitioner must plead those issues with particularity. The Second Amended Complaint fails to plead any facts in support of the legal conclusions asserted, let alone pleading facts with particularity.

Second, the Petitioner fails to plead even one predicate racketeering act let alone two as required by RICO. *Schultz v. Rhode Island Hosp. Trust Nat. Bank*, 94 F.3d 721 (1st Cir. 1996); *McDonald v. Schencker*, 18 F.3d 491 (7th Cir. 1994) (stating that multiple acts over a period of time committed for a single purpose do not establish continuity needed for pattern of racketeering). The Petitioner alleges breach of fiduciary duty (which also would not survive a motion to dismiss or for summary judgment), but a breach of fiduciary duty is not a predicate act under RICO. *Manion v. Freund*, 967 F.2d 1183 (8th Cir. 1992), *rehearing den'd*. The Petitioner identifies a cause of action as one for mail fraud, but the facts alleged do not in any way support a cause of action for mail fraud. Mail fraud is not a predicate act unless it is sufficiently pled. *McDonald v. Schenker*, 18 F.3d 491 (7th Cir. 1994). *See In re Burzynski*, 989 F.2d 733 (5th Cir. 1993); *Eastern Pub. and Advertising Inc. v. Chesapeake Pub. and Advertising, Inc.*, 895 F.2d 971 (4th Cir. 1990), *cert. den'd*, 497 U.S. 1025, 110 S. Ct. 3274, 111 L. Ed. 2d 784, *cert. den'd*, 498 U.S. 819, 111 S. Ct. 65, 112 L. Ed. 2d 39.

Third, the Petitioner does not allege any RICO enterprise. The bank and its employees are associated only by their banking activities and cannot together constitute a RICO enterprise. *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438

(5th Cir. 1987), *cert. den'd*, 483 U.S. 1032, 107 S. Ct. 3276, 97 L. Ed. 2d 780; *Mery v. Universal Sav. Ass'n*, 737 F. Supp. 1000 (S.D. Tex. 1990); *H.G. Gallimore, Inc. v. Abdula*, 652 F. Supp. 437 (N.D. Ill. 1987); *Witt v. South Carolina Nat. Bank*, 613 F. Supp. 140 (D.C.S.C. 1985). A person charged with RICO cannot also be the RICO enterprise. The Petitioner must plead an enterprise and the members of the enterprise. *Charles River Data Systems, Inc. v. Oracle Complex Systems Corp.*, 788 F. Supp. 54 (D. Mass. 1991); *Zahra v. Charles*, 639 F. Supp 1405 (E.D. Mich. 1986).

Finally, Allfirst cannot be liable for the acts of its employees under a theory of respondeat superior or vicarious liability. *Laro, Inc. v. Chase Manhattan Bank*, 866 F. Supp. 132 (S.D.N.Y. 1994), *aff'd*, 50 F.3d 810; *Prochaska & Associates, Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 798 F. Supp. 1427 (D. Neb. 1992); *Collective Federal Sav. v. Creel*, 746 F. Supp. 1307 (M.D. La. 1990). The Petitioner must allege the specific racketeering activities engaged in by the individuals involved or official conduct of the bank constituting racketeering activity. The Petitioner completely fails to do so.

The Second Amended Complaint will not survive a motion to dismiss, and it will not serve the interests of justice or judicial economy to allow the Petitioner to proceed to prosecute the Second Amended Complaint.

d. Count IV of the Second Amended Complaint, for breach of the covenants of good faith and fair dealing, essentially restates Count III of the Complaint for breach of contract.

The Petitioner has had a cause of action for breach of contract pending since the original Complaint was filed. Implied in every contract is a duty of good faith and fair dealing. By alleging the new cause of action, the Petitioner simply duplicated her theory of recovery that was already set forth in

the cause of action for breach of contract in the original Contract. The Petitioner will not be prejudiced if the cause of action is stricken.

e. Counts VIII and IX of the Second Amended Complaint allege causes of action pursuant to the state and federal consumer protection acts respectively, again adding new legal theories and presumably new factual bases for the claims.

Counts VIII and IX of the Second Amended Complaint add causes of action pursuant to the "Maryland Consumer Protection Act" and the "Federal Deceptive Trade Practice Act." The Petitioner does not allege, however, the statutory bases for the causes of action. Allfirst is left to speculate as to the specific causes of action being pled and the statutes upon which they are based.

Like the RICO causes of action, the Petitioner has added completely new legal theories and presumably new factual bases for recovery under the two acts. (The Petitioner did not plead any specific facts in support of these claims.) It is completely inappropriate for the Petitioner to amend her complaint to add new legal theories and new factual bases for recovery on the eve of trial. Md. R. Civ. Pro., R. 2-341 (2001). Allfirst would have been unfairly prejudiced if it were forced to defend these statutory causes of action without adequate notice of the claims and an opportunity to explore the claims in discovery.

f. Count XI (there is no Count X in the Second Amended Complaint) is for "Breach of General Duty of Care" which presumably is a cause of action for negligence. The Petitioner had a cause of action for negligence set forth in the Complaint and it was dismissed by the Trial Court.

The Petitioner states in a conclusory manner that Allfirst breached its "general duty of care." Count XI is unclear as to what cause of action is being alleged, but it sounds in negligence. The Petitioner had filed a cause of action for negligence as Count I of the Complaint, and that cause of action was dismissed by Order of the Trial Court dated January 11, 1999. It is inappropriate for the Petitioner to attempt to revive her cause of action for negligence through the filing of a nondescript cause of action in an amended pleading.

g. Counts XII and XIII are for breach of fiduciary duties, which like the previous causes of action, add new legal theories and factual bases for recovery, and will not survive a dispositive motion.

Counts XII and XIII of the Second Amended Complaint allege causes of action for breach of the duty of loyalty and for breach of fiduciary duty. The Petitioner entered into a simple banking contract with Allfirst which did not impose any fiduciary duties upon Allfirst. The Second Amended Complaint fails to allege the source of the alleged fiduciary duties and there are no facts in the record suggesting that Allfirst Bank had any fiduciary obligation to the Petitioner.

Regardless of whether or not there was a fiduciary duty owed by Allfirst to the Petitioner, the Petitioner was attempting to allege new legal theories of recovery which rely upon new factual bases that Allfirst did not have an opportunity to explore

in discovery. It is completely inappropriate for the Petitioner to attempt to expand the scope of this litigation significantly after the close of discovery and on the eve of trial.

h. Conclusion.

It is apparent that it would have been impossible for Allfirst to provide a meaningful defense to the multiple claims set forth in the Second Amended Complaint at a trial that was firmly scheduled to take place less than 12 months after the Second Amended Complaint was filed. Furthermore, if the Trial Court did not strike the Second Amended Complaint, Allfirst would have been denied the basic procedural rights to challenge the pleading, to explore the claims in discovery, and to test the legal sufficiency of the evidence through a motion for summary judgment. The unfair prejudice to Allfirst is readily apparent.

The matter of *Berry v. Department of Human Resources* is a case based on a similar procedural history as the case *sub judice*. In *Berry*, the Court of Special Appeals stated as follows:

> . . . In striking the amended complaint, the court noted:
>
> > *By waiting so long, Plaintiffs effectively prevented the Defendant[s] from investigating the Amended Complaint or issuing new discovery requests, as the Scheduling Order required that all discovery be completed by April 16, 1990. . . .*
> >
> > *By allowing the Plaintiffs to file an amended complaint at this point in time, all of the enormous time and expense the parties in this Court have given to the Motion to Dismiss, Motion for Reconsideration, and now the Motion for Summary Judgment would be laid to*

> *waste. Further, it would make a mockery of the Scheduling Order, as Plaintiffs themselves recognize it would have to be totally revised to accommodate the Amended Complaint.*

The court was also aware that the plaintiffs had had plenty of time to prepare their case and develop their facts. . . . This is not a case, then, in which the plaintiffs were subjected to unduly stringent time requirements that they could not meet. . . .

It is true, as plaintiffs allege, that MD. Rule 2-341(c) states that amendments to a pleading "shall be freely allowed when justice so permits," *but that has to read in conjunction with Rule 2-504(c), which provides that a pre-trial scheduling order "controls the subsequent course of the action but may be modified by the court to prevent manifest injustice." The court's action here was not taken in blind, arbitrary allegiance to its scheduling order, but rather to prevent what it regarded would be an injustice.* The concern was not over the fact of the amendments but their timing. The plaintiffs were not precluded from amending their complaint. *They were precluded from amending it nine weeks after they said it would be amended when, in the meantime, the defendants and the court were led into devoting their energies and resources into dealing with what remained of the initial complaint. We find no abuse of discretion.*

Berry v. Department of Human Resources, 88 Md. App. 461, 594 A.2d 1258 (1990) (emphasis added).

ii. Statute of Limitations Analysis

As set forth above, Judge Martin did not even address the statute of limitations issues. The Court of Special Appeals, however, ruled that the Second Amended Complaint was filed after the statute ran. The Second Amended Complaint was filed approximately 5 1/2 years after the relevant events occurred. The new causes of action alleged therein are barred by the applicable statute of limitations.

The gravamen of the Second Amended Complaint is the alleged RICO violation by Allfirst. The statute of limitations applicable to RICO claims is three years. *See Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984); *Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234 (E.D. Penn. 1983); *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F. Supp. 673 (N.D. Ind. 1982). There can be no doubt that the RICO claims are barred by the applicable statute of limitations unless they are found to relate back to the Complaint. A cause of action relates back *only if facts were pled in the initial pleading providing the defendant with sufficient notice of the claims that are restated in the amended pleading. Cline v. Fountainrock Lime & Brick Co.*, 214 Md. 251, 258, 134 A.2d 304 (1957); *Morrell v. Williams*, 279 Md. 497, 366 A.2d 1040 (1976); *Gensler v. Korb Roofers, Inc.*, 37 Md. App. 538, 378 A.2d 180 (1977).

It strains credulity to suggest that Allfirst was provided notice of RICO claims in the Complaint. RICO is a complicated statute based upon egregious conduct and it provides for the trebling of actual damages and for exemplary damages. As set forth above, to plead a cause of action pursuant to RICO, the Petitioner must plead a "pattern of racketeering" and at least two instances of racketeering activity. In addition, the requisite pattern requires a showing of a relationship between the predicate acts and a threat of continuing criminal activity. The racketeering activity must be performed for the purpose of obtaining a benefit to the perpetrators. *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 109 S. Ct. 2893,

106 L. Ed. 2d 195 (1989); *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130 (4th Cir. 1993). It would also be helpful to reference the statute.

There can be no doubt that the Petitioner made no such allegations in the Complaint. In the Complaint, the Petitioner does not allege any racketeering activity; she does not allege a pattern of racketeering activity; she does not allege a RICO enterprise; she does not allege any income derived by or benefit to Allfirst; and she does not allege any threat of continuing criminal activity.

The only causes of action pending from the initial Complaint were for breach of contract and the statutory tort of wrongful dishonor. Undoubtedly, the RICO claims involve proof of additional facts and require different elements of proof than the underlying claims pled in the Complaint. In addition, they significantly increase Allfirst's exposure to claims for damages that did not exist under the Complaint. In accordance with the doctrines of relation back and notice pleading, there can be no doubt that the claims set forth in the Second Amended Complaint do not relate back and should be stricken. Notice pleading is a simple standard to satisfy, but it is evident that the Petitioner fails completely to meet this standard as it applies to determining whether the Second Amended Complaint relates back to the Complaint.

iii. UCC Issues Raised in the Petition

As set forth above, Allfirst has always admitted that it wrongfully dishonored the checks written on the Petitioner's account. Allfirst has maintained that by failing to punch a hole in the MICR line in the certified check, that the Petitioner's account was improperly debited twice for the same check, thereby causing the artificially low balance and the wrongful dishonor of checks that should have been paid. The Trial Court also specifically found that Allfirst's failure to punch the hole proximately caused the checks to be dishonored wrongfully.

In the Second Amended Complaint, the Petitioner expounds on a new theory explaining why the checks should not have been dishonored. Under the Petitioner's new theory, when a bank considers whether or not to return a series of checks, the UCC requires that the bank credit the account in the amount of the largest check returned after that check is returned. Then each of the remaining checks is compared to the account balance one at a time under the same process to determine whether it should be paid. The checks presented on a single day should not be compared as a group. Under the Petitioner's theory, if Allfirst had employed this technique, only 1 of the 32 checks would have been returned.

If the Petitioner is correctly stating the UCC requirements, she is simply stating another basis upon which it can be found that Allfirst wrongfully dishonored checks 2 through 32. Allfirst has always admitted that it wrongfully dishonored checks 2 through 32, as well as the first check. It is irrelevant whether or not there is a second explanation for why the dishonors were wrongful.

The Second Amended Complaint, however, goes a step further and alleges that Allfirst dishonored these checks intentionally and for its own benefit. All allegations are conclusions, however, and there are no specific factual allegations set out in the Second Amended Complaint to support these conclusions. The Petition does not cite any specific allegations in the Second Amended Complaint, any evidence in the record or any evidence offered at trial to support these conclusions.

The relevance of the Petitioner's argument is unclear. The Petition fails to reference any order of the Trial Court relating to the UCC that is at issue. The issue to be determined by this Court is whether or not the Trial Court abused its discretion in striking the Second Amended Complaint. Based on the preceding analysis of the Second Amended Complaint

and the timing of its filing, it is apparent that the Trial Court did not abuse its discretion in striking in the Second Amended Complaint.

iv. Discovery Issues Raised by the Petitioner

The Petitioner states in a conclusory manner that Allfirst thwarted her discovery efforts, and as a result, she was not able to prepare and file the Second Amended Complaint until April 4, 2001. This statement is factually incorrect and illogical.

a. The Petitioner's Assertion is Factually Incorrect.

Allfirst complied with all orders of the Trial Court, and the Petitioner fails to cite any evidence in the record to the contrary. Furthermore, the Petitioner fails to identify any order of the Trial Court which she appealing. The record demonstrates that it was the Petitioner that repeatedly failed to fulfill her discovery obligations.[1]

The Petitioner had over two years to conduct her discovery. She deposed every individual that she sought to depose. Curiously, despite her RICO theories, she never served a notice of taking deposition on Allfirst. Allfirst gave the Petitioner two

---

1. Allfirst had to obtain an order of the Trial Court to depose the Petitioner. Allfirst filed a motion to compel responses to its second set of interrogatories and request for production of documents. The Trial Court, Smith, J., granted the motion to compel at the January 10, 2001, hearing. Subsequently, the Petitioner failed to comply with the Trial Court order compelling discovery responses. Allfirst then filed a motion for sanctions for failure to answer the discovery, but that motion was never heard by the Trial Court. Finally, the Petitioner failed to designate any expert witnesses during the twice extended discovery period, and instead, sought to designate multiple expert witnesses at the second pretrial conference on January 10, 2001. The Trial Court, Smith, J., allowed the Petitioner to designate one expert witness at the pretrial conference, but the Petitioner never actually designated an expert witness.

complete operational policy manuals and all account records relating to the account at issue. The Petitioner was given the personnel files that Allfirst possessed for the former employees involved with this situation. The Petitioner had over five years to conduct her own investigation of the matter. Despite her efforts, the Petitioner never produced any evidence, in discovery or at trial, that Allfirst mishandled the certified check intentionally or engaged in any conduct intended to cause her harm.

Based on a review of the Petitioner's first counsel's motion to withdraw, it is clear that in 1999 the Petitioner believed that she had RICO claims. *See* Motion to Withdraw Appearance of Counsel attached hereto and incorporated herein by reference as Exhibit 1. Therefore, it is disingenuous for the Petitioner to now argue that she could not plead her RICO claims until she received the entire Allfirst operational policy manual.

The Petitioner also fails to identify what specific Trial Court order she contends was in error. It follows that the Plaintiff fails to demonstrate how the Trial Court abused its discretion. *Fisher v. State*, 128 Md. App. 79, 131, 736 A.2d 1125 (1999) (stating the trial judge is afforded broad discretion in resolving discovery disputes and will be overruled only if that discretion is abused); *Beck v. Beck*, 112 Md. App. 197, 210, 684 A.2d 878 (1996); *North River Ins. Comp. v. Baltimore*, 343 Md. 34, 47-48, 680 A.2d 480 (1996); *Tretick v. Layman*, 95 Md. App. 62, 619 A.2d 201 (1993) (stating failure to inform appellate court as to whether any motion to compel was filed and failure to identify any particular ruling of the trial court in the extract does not preserve the issue for appeal).

b. The Petitioner's Assertion is Illogical.

In the Petition, the Petitioner states that the Second Amended Complaint drew upon the material which the Petitioner received belatedly due to the Bank's efforts to thwart discovery. As evidenced by the words of the Petitioner's own

counsel, that is simply a false statement. Although the Petitioner contends in the Second Amended Complaint that the Allfirst 1995 operational policy manual on commercial accounts was not in compliance with the UCC, that issue is irrelevant.[2] It is irrelevant because the Petitioner is arguing that Allfirst's conduct violated the UCC, not that it violated its own policy manual. Therefore, whether or not the Petitioner ever obtained the policy manual is irrelevant.[3] She only needed the UCC to determine whether Allfirst's handling of her account violated the UCC. She did not need the policy manual.

The Petitioner has had the UCC available to her since October of 1995 when the relevant events occurred. Accordingly, as of October 16, 1995, the date on which she reviewed her account statements and the mistake was discovered, the Petitioner had all of the information she needed to determine whether or not Allfirst violated the UCC, and if so, how. Therefore, the statute of limitations began to run on October 16, 1995, and there is no discovery rule issue in this case.

v. The Petitioner would be barred by res judicata from seeking punitive damages and by collateral estoppel from pursuing the new claims set forth in the amended complaints in a new trial.

The significance of the Amended Complaint and the Second Amended Complaint is that the Petitioner alleges the same

---

2. That issue was not an issue at trial and it has never been determined whether or not the 1995 Allfirst operational policy manual relating to commercial accounts was in compliance with the UCC. In August of 1998, Allfirst, in the process of acquiring another bank, and at a total cost in the millions of dollars, implemented a New Year 2000 compliant computer system and a corresponding 1998 operational policy manual replacing the 1995 manual.

3. The Petitioner fails to inform this Court that Allfirst had provided her the portions of the 1995 manual relating to certified checks. Upon order of the Trial Court, Allfirst provided its entire 5 volume 1995 manual and its entire 2 volume 1998 manual.

underlying breach of contract and wrongful dishonor by Allfirst, but now she alleges that Allfirst's conduct was intentional, based upon racial animus, constitutes bank fraud and was a violation of RICO. There are no specific allegations in either amended complaint to support these theories of recovery and there is no evidence in the record, no evidence offered at trial and no evidence cited in the Petition to support these theories of recovery.

The Petitioner repeatedly states in a conclusory manner that the violation of the UCC was "a knowing, willful violation." UCC section 4-402 allows a claimant to seek punitive damages for intentional misconduct and intentional harm. *Siegman v. Equitable Trust Co.*, 267 Md. 309, 297 A.2d 758 (1972); *Kendall Yacht Corp. v. United California Bank*, 50 Cal.App.3d 949, 123 Cal. Rptr. 848, 17 UCC Rep. Service 1270 (1975). The Petitioner did not meet her burden at trial of proving that the mishandling of the certified check by Allfirst Bank was intentional. Judge Lombardi made an explicit finding that there is no evidence of any intentional misconduct and he made an explicit finding that no representative of Allfirst knew about the mistake until October 16, 1995, the day the Petitioner went to the bank to determine the nature of the problem with her account. Furthermore, the Trial Court found that Allfirst did all that it could do within its power to rectify the situation and to make the Petitioner whole. In the Petition, the Petitioner does not cite any evidence in the trial record or obtained through discovery suggesting or demonstrating that the violation was knowing or willful. In this appeal, the Petitioner is asking this Court to give her another trial on the Second Amended Complaint, but she is not challenging the Trial Court's findings.

The principle of *res judicata* will bar the Petitioner from seeking punitive damages at a second trial. *Walls v. Bank of Glen Burnie*, 135 Md. App. 229, 244-46, 762 A.2d 151 (2000) (stating "in order to serve the interests of finality and avoidance of piecemeal and repetitive litigation among the same parties,

the doctrine of *res judicata* holds that all claims that a plaintiff actually brought and could have brought based on the same operative set of facts are barred"); *Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md.App. 64, 74-77, 748 A.2d 34 (2000); *Colandrea v. Wilde Lake Community Ass'n, Inc.*, 361 Md. 371, 387-93, 761 A.2d 899 (2000); *Alvey v. Alvey*, 225 Md. 386, 390-91, 171 A.2d 92 (1961). The Petitioner had the opportunity to allege and prove intentional wrongdoing and to claim punitive damages pursuant to her UCC section 4-402 claim set forth in the Complaint, and she failed to do so.

In a new trial, the Petitioner will be *collaterally estopped* from attempting to prove that Allfirst intentionally caused her harm. *Colandrea v. Wilde Lake Community Ass'n, Inc.*, 361 Md. 371, 387-93, 761 A.2d 899 (2000) (stating when an issue of fact is litigated, and the determination of the issue is essential to the final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim). Intention and knowledge are essential elements of the new causes of action set out in the Second Amended Complaint. The factual issue of whether or not the harm caused to the Plaintiff was intentional was determined by the Trial Court, and the Petitioner does not contest the Trial Court findings. Therefore, the Petitioner will be *collaterally estopped* from attempting to prove that Allfirst intentionally caused her harm or deceitfully hid its mistake. Any error the Trial Court could have made regarding its striking of the amended complaints was harmless as the Petitioner will be unable to prove her new causes of action.

CONCLUSION

As set forth above, the Petition should be dismissed or denied for various reasons. First, the Supreme Court of the United States does not have jurisdiction since the Petitioner fails to present a federal question. The only issues brought before the Supreme Court relate to rules of civil procedure and discovery. Second, as set forth above, the Maryland Courts did not commit any errors of law or make any erroneous findings fact. The Petitioner simply seeks a second opportunity to prosecute her case. Even if she were given a second opportunity, she would be estopped from obtaining the relief she seeks. For the foregoing reasons, the Petition should be dismissed or denied.

WHEREFORE, the Respondent, Allfirst Bank, formerly known as the First National Bank of Maryland, respectfully requests that the Supreme Court of the United States **DISMISS** and/or **DENY** the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES M. GREENAN
Counsel of Record
KEVIN M. TRACY
MCNAMEE, HOSEA, JERNIGAN, KIM,
GREENAN & WALKER, P.A.
6411 Ivy Lane, Suite 200
Greenbelt, MD 20770
(301) 441-2420

Attorneys for Respondent

APPENDIX

APPENDIX — MOTION TO WITHDRAW APPEARANCE OF COUNSEL

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Case No.: CAL 98-20583

In re:

Kimberly Lacewell Bennett

Plaintiff

v.

First National Bank of Maryland

Defendant

MOTION TO WITHDRAW APPEARANCE OF COUNSEL

Petitioner, Glenna E. Ellis, Esquire, moves for leave to withdraw her appearance as counsel for Plaintiff, Kimberly Lacewell Bennett, in the above-captioned case. The grounds for this motion are as follows:

1. That the undersigned counsel has represented the Plaintiff in this matter since August, 1998.

2. The Plaintiff has been very combative and uncooperative with the Petitioner.

3. Furthermore, Plaintiff was insistent upon counsel filing a racketeering (RICO) claim against the Defendant in this matter which the undersigned believed was inappropriate. On this basis as well the undersigned sought to withdraw in the summer of 1999.

4. Specifically on June 29, 1999, the undersigned advised Plaintiff in writing that she was withdrawing her appearance in the case.

5. The Plaintiff has apparently moved out of state but has not advised the Petitioner as to her new address and telephone number.

6. That Petitioner has attempted to contact the Plaintiff by telephone and letter but Plaintiff failed to respond.

7. That on November 30, 1999, counsel advised the Plaintiff of her intent to petition this Court to withdraw her appearance; said notice was mailed first class, postage prepaid to: Kimberly Lacewell Bennett, 2003 Waterleaf Way, Mitchellville, MD 20721. A copy of said letter is attached hereto as Exhibit 1.

8. That the Plaintiff contacted my office on December 22, 1999 and stated that she wished me to withdraw my appearance. A copy of said letter is attached hereto as Exhibit 2.

WHEREFORE, Petitioner, moves this Honorable Court to enter an order withdrawing her appearance as counsel for the Plaintiff.

Appendix

Respectfully submitted,

s/ Glenna E. Ellis
Glenna E. Ellis
PG ID# EL0188
PO Box 4913
Largo, Maryland 20775-0913
301-386-3593
Attorney for Debtor

Appendix

Exhibit 1

Glenna E. Ellis
Attorney at Law

P.O. Box 4913
Largo, MD 20775-0913

Phone (301) 386-3593
Fax (301) 925-4070
email gellis@onebox.com

November 30, 1999

Kimberly L. Bennett
2003 Waterleaf Way
Mitchellville, MD 20721

Re: Bennett v. First National Bank of Maryland
Case No. CAL98-20583

Dear Kim:

I have tried to contact you by telephone but have not been successful. I have even left voice mail for you to call me as soon as possible, but still have not heard from you. I have heard rumors that you have relocated to Arkansas. This letter is being sent to your Mitchellville address as that is the only address that I have for you.

It is imperative that you contact me immediately regarding your lawsuit against First National Bank of

Maryland. They want to do a deposition of you but I have been unable to furnish them with dates that you would be available. Their attorney has stated that he will be filing a motion to compel you to appear at a deposition in the very near future.

In June 1999, I advised you that I would be withdrawing from your case. In one of our last conversations you stated that you had found an attorney that would be representing you at trial in this matter but preferred that I stay on the case until your deposition was completed.

Your deposition will be key to your success at trial, therefore, it would be appropriate for this individual to enter their appearance now so that they can be involved in your deposition.

Therefore, please be advised that on December 7, 1999 I will be filing a motion with the court to withdraw as your counsel in the above-referenced case. You are further advised that you should have new counsel enter an appearance on your behalf or advise the Clerk of the Circuit Court of Prince George's County, 14735 Main Street, Upper Marlboro, Maryland 20772, that you will proceed further without counsel.

Sincerely yours,

s/ Glenna E. Ellis
Glenna E. Ellis

Appendix

Exhibit 2

12/22/99

Glenna,

Please contact Kevin Tracey asap and let him know of your withdrawal. Also please file your withdrawal before the Holiday.

I will be back in contact with you in the near future to address some very serious issues.

s/ Kimberly

P.S.

My office phone number is the same as it has always been (301) 925-9091.